Superior Court of Justice

Ministry of the Attorney General

Ontario

REPORT OF THE CASE MANAGEMENT IMPLEMENTATION REVIEW COMMITTEE

FEBRUARY 2004

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Report of the Case Implentation
Review Committee

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PART 1: INTRODUCTION

MANDATE

The Case Management Implementation Review Committee ("CMIRC") was created to examine and provide recommendations regarding the implementation of case management in Toronto Region. CMIRC was established by the Toronto Regional Senior Justice as an *ad hoc* subcommittee of the Toronto Case Management Steering Committee.

The Committee was mandated to review the practices and procedures that have been developed to implement case management under rule 77 in Toronto, and to consider what, if any, changes might be made for the benefit of litigants, lawyers, and the court. Initially, the following matters were considered:

- Case management techniques and practices at the administrative, master, judiciary and bar levels
- The interconnection between case management and mandatory mediation
- The timeliness and number of attendances required by case management; and
- Resources and their utilization.

During the course of its review, the Committee was also asked to consider the timelines for mandatory mediation.

COMPOSITION

Members

- The Honourable Madam Justice Susan E. Lang, Chair
  Superior Court of Justice, Toronto
- The Honourable Madam Justice Katherine E. Swinton
  Superior Court of Justice, Toronto
- Master Calum MacLeod, Administrative Master
  Superior Court of Justice, Toronto
- Lori Newton, Director, Court Operations, Toronto Region
  Court Services Division, Toronto
- Ann Merritt, Director, Civil/Family Policy & Programs Branch
  Court Services Division, Toronto
- Mark Arnold, Bar Representative
  Partner, Gardiner, Miller, Arnold LLP, Toronto
- Carolyn Horkins, Bar Representative
  Partner, Gowling, Lafleur Henderson LLP, Toronto

Advisory Participants

- D. Kevin Carroll, Q.C., President, Canadian Defence Lawyers
  Partner, Carroll Heyd Chown, Barrie
- Paul Tushinski, Vice-President, Metropolitan Toronto Lawyers Association
  Partner, Dutton Brock LLP, Toronto
- Kevin R. Aalto, Director, Advocates' Society; Chair, Advocates' Society Task Force on Case Management
  Partner, Gowling, Lafleur Henderson LLP, Toronto
- Peter J.E. Cronyn, Co-Chair, Advocates' Society Task Force on Case Management
  Partner, Nelligan O'Brien Payne LLP, Ottawa
- Diana Edmonds, Parliamentarian, Ontario Trial Lawyers Association
  Partner, Klaiman Edmonds, Toronto

Staff

- Susan Charendoff, Lead Counsel, Civil/Family Policy & Programs Branch
  Court Services Division
- Tina Cheng, Judges' Law Clerk
- Cindy Elphinstone, Secretary

METHODOLOGY

In conducting its review, the Committee has consulted with and received input from:

- Bar organizations and individual members of the bar
- Masters and judges of the Toronto Region; and
- Officials and staff of the Ministry of the Attorney General Court Services Division.

Written submissions were received from The Advocates' Society, Ontario Trial Lawyers Association, Toronto Lawyers Association and Canadian Defence Lawyers. These are attached at **Appendices 1 to 4.** In addition, the Ontario Bar Association compiled comments from individual members of the bar. The Committee is grateful for the bar's input.

The Chair of the Committee met individually with each Toronto case management master. The case management masters also held meetings amongst themselves. In addition, through Administrative Master MacLeod, they provided helpful information to the Committee about the operation of case management in Ottawa and Windsor, where some of the Toronto masters preside from time to time. Toronto masters also exchange ideas with the masters in Ottawa and Windsor on an ongoing basis in an attempt to develop best practices. The Toronto judges were asked for their input on case management, and feedback was also obtained from court staff.

The Committee struck a sub-committee on statistics, which recommended the collection of statistical data to inform this review and to be provided to the Regional Senior Justice and Case

Management Steering Committee for the ongoing monitoring of case management in Toronto. Courts Services Division prepared a statistical analysis report on court activities and trends for case managed civil cases commenced in Toronto between 1997 and 2003. The full report is attached at **Appendix 5**, and is summarized below in the section entitled "Statistical Analysis". Court Services Division also prepared background information about the Toronto administration, which is attached at **Appendix 6**).

Background

Rule 77 of the Rules of Civil Procedure establishes civil case management in Ontario for civil non-family proceedings.[1] Currently, the rule applies in Toronto, Ottawa and Windsor. The purpose of case management, as provided in rule 77.02, is to reduce unnecessary delay and cost, facilitate early and fair settlements and bring cases expeditiously to a just determination, while allowing sufficient time for the conduct of the proceeding. Under case management, the court supervises the progress of cases. Timelines for the occurrence of key litigation events are set out in rule 77.

Ontario's case management regime has its origins in the work of the Joint Committee on Court Reform in the late 1980s and early 1990s, which led to case management pilot projects in Toronto, Windsor, and Sault Ste. Marie.

In 1994, the Civil Justice Review was established at the joint initiative of the then Chief Justice of the Ontario Court of Justice and the then Attorney General for Ontario. Its mandate was to develop an overall strategy to make the civil justice system speedier, less costly to litigants and more effective in delivering justice. In its First Report (March 1995) and Supplemental and Final Report (November 1996), the Review recommended a model of case management in which the judiciary, including case management masters, would take an active role in managing cases through to trial. Under the recommended case management model, lawyers would no longer have the sole responsibility for moving cases through to trial. Instead, that responsibility would be shared with the judiciary and the administration.

The First Report of the Civil Justice Review explained that "[t]he notion of case management entails a significant shift in the cultural mind set that has characterized the processing of civil cases in our courts for generations" (at 170). In the past, lawyers, with their clients, decided on the pace of litigation, and the time limits in the Rules of Civil Procedure were "honoured more in the breach than in the observance" (at 170). As a result, the public perceived unreasonable delays and excessively expensive litigation. Case management, in contrast, would involve "the establishment of reasonable, but firm, time limits and the adherence to those parameters" (at 170). As well, lawyers would be required to give reasons for any necessary extensions of time beyond those built into the rules – a significant change for lawyers accustomed to being in sole control of the pace of litigation.

[1] Certain case types are excluded from rule 77, including bankruptcy, class proceedings, commercial list, estates, family and construction lien matters.

Case management under rule 77 was introduced in Ottawa (for 100% of eligible civil cases) and Toronto (initially for 10% of eligible cases and subsequently for 25% of eligible cases) in 1997. The application of rule 77 was expanded in Toronto from 25% to 100% of eligible cases in July 2001. In January 2003, rule 77 was introduced in Windsor, which had previously operated under a different case management rule.

Mandatory mediation under rule 24.1 applies to civil (non-family) case managed actions, with some exceptions. Mandatory mediation is designed to help parties resolve disputes outside of court early in the litigation process, in order to save them time and money. Rule 24.1 was established as a pilot project in Toronto and Ottawa in January 1999. Following a positive two-year evaluation, it was made permanent in July 2001, and was expanded to Windsor in January 2003.

Since case management was introduced in Toronto, a total of 11 case management masters have been appointed. The first was appointed in 1997, five more were appointed from 1998 to 1999, and an additional five case management masters were appointed in March 2001. It should be noted that the time equivalent to 2.5 case management masters is assigned to other matters (1 to rule 76 pre-trials, 1 to construction liens and .5 to traditional masters' motions), leaving a complement of 8.5 case management masters available to support case management. A detailed report on case management masters' demographics is attached at **Appendix 7**.

Statistical Analysis

The following is a summary of the statistical analysis report prepared by Court Services Division (reproduced in full at **Appendix 5**). The report contains data on court activities and trends for case managed civil cases commenced in Toronto from 1997 to the end of December 2003.[2]

Civil Cases Initiated[3]

Since 1999, the number of civil cases initiated in the Superior Court of Justice in Toronto has remained relatively stable. Of civil cases initiated in 2002, approximately 12,000 are case managed actions, about 5,000 are simplified rules proceedings, and the balance is "other" civil cases. Civil cases initiated by year-end 2003 were 18,125, a 4% increase over cases initiated in 2002.

Defence Rate

Over a five-year period from 1997 to 2001, approximately 72% of case managed actions have been defended. This is in contrast with historical defence rates of approximately 55% for non-case managed cases over the same period. This difference is the effect of rule 77.08, which requires the plaintiff to either obtain a defence or note the defendant in default and obtain judgment within 180 days of the commencement of the proceeding. The increased volume of defended cases means a significant increase in interlocutory workload for the judiciary and the administration.

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[2] Statistics for "case management" include any cases ordered into case management even though they may have once been non-case managed. Further, statistics for late 2002 and 2003 to date must be viewed with the understanding that, given their relative youth, many defences have not yet been filed and other events in the life of the case have not yet taken place.

[3] Case types excluded from rule 77 are not included in this data (including bankruptcy, class proceedings, commercial list, estates, family and construction lien matters).

Mandatory Mediation

60-Day Postponements

The use of the 60-day consent postponement of mediation increased from 31% of applicable defended actions in 1999 to approximately 54% in 2003. Orders for extensions of time to complete mediation also increased from approximately 4% of defended actions subject to mandatory mediation in 1999 to approximately 40% in 2003.[4]

Mediator Selection

The percentage of cases in which the local mediation coordinator appoints mediators (about 40%) has not decreased significantly since the introduction of mandatory mediation in 1999. About 35% of litigants selected roster mediators until 2003 when that number seemed to drop significantly in favour of non-roster mediators. The selection of non-roster mediators increased from approximately 6% in 1999 to approximately 13% in 2002. The use of non-roster mediators continued to escalate in 2003. As of the end of December 2003, approximately 26% of those cases mandated to mediate chose non-roster mediators.

Mediation Results

Of the cases referred to mandatory mediation, the full settlement rate at mediation remained fairly constant at 35% - 38% since the introduction of mandatory mediation in 1999. There has been a reduction in the number of cases being reported as partially settled from approximately 20% in 1999 to approximately 7% in 2003. Currently and for the past two years, approximately 38% of cases settle, 7% partially settle, and 51% do not settle.

Disposition Aging

Case Management

Over a five-year period from 1997 to 2001, approximately 65% of cases initiated were resolved within two years of commencement of the proceeding, and 76% of cases initiated were resolved within three years of commencement.

Simplified Rules

Over a five-year period from 1997 to 2001, approximately 87% of the cases initiated were resolved within two years of commencement of the proceeding, and 90% of cases initiated were resolved within three years of commencement.

Other (non-case managed civil cases)

Over a five-year period from 1997 to 2001, approximately 28% of the cases initiated were resolved within two years of commencement of the proceeding, and 37% of cases initiated were resolved within three years of commencement of the proceeding.

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[4] It should be noted that there is some overlap in the number of orders for extensions and consent postponement, because it is not uncommon for counsel to first seek the 60-day postponement and then a further extension.

On average, case managed cases resolved at twice the rate of non-case managed cases within two years of commencement of the proceeding. The statistic for three years is similar.

Motions

Motions activity continues to escalate in case management, simplified rules, and non-case managed cases. In 2002, 32,913 motions were scheduled, compared to 1997, when 26,681 motions were scheduled to be heard. This represents approximately a 23% increase in motions scheduled. About 24% of the motions activity in Toronto is on actions commenced in other jurisdictions. There have been some changes to motions scheduling practice during this period of time.

Although not apparent from the chart in this Report, approximately 50% of motions before the masters are "in writing" compared with 14% for judges. Litigants appear to embrace the practice of adjudicating motions "in writing" rather than by appearance. A large number of "in writing" motions are primarily consent motions for extension of timelines.

Case Conferences

The use of case conferences by litigants continues to escalate proportionately to the implementation of 100% case management. There were approximately 10,000 case conferences conducted in 2002. An unknown percentage of case conferences are conducted "in writing". The majority of case conferences conducted by masters are done by conference call. The percentages are not available.

Trial Scheduling Court

Appearances and re-appearances at Trial Scheduling Court have increased since implementation of 100% case management. In 2002, there were 8,829 appearances in both case managed and non-case managed actions. For the calendar year 2003, there were 16,684 appearances at Trial Scheduling Court. Approximately 9,000 of those appearances relate to case managed actions.

Settlement Conferences or Pre-Trials

Since implementation of 100% case management, there has been no appreciable increase in the number of matters proceeding to either settlement conference or pre-trial. There does, however, appear to be a higher cancellation rate in case managed proceedings compared to non-case managed proceedings. It should be noted that for standard track actions, a settlement conference is not scheduled in Toronto until the trial date is set at Trial Scheduling Court.

Scope of Recommendations

The Committee was not mandated to reconsider the current model of case management, but rather to suggest improvements to its operation in the Toronto Region.

The Committee has heard that in Toronto there is continuing support in principle for case management and an appreciation for the goals it is trying to achieve. It has been reported that case management is effective in assisting parties toward resolution or trial, that early timetabling is

helpful in getting and keeping cases on track, and that case conferences can be an effective means of resolving issues.

At the same time, it is widely acknowledged that there are "growing pains", which must be addressed in order for case management to fully realize the objective of reducing unnecessary cost and delay in litigation. The Committee therefore requested members of the bar, bench and courts administration to provide insights into the problem areas.

The Committee did not have a research budget. Although courts administration generated helpful statistics and it was possible to investigate certain hypotheses, this review did not include a full-scale objective measurement of the impact of case management or mandatory mediation on civil litigation.

It is relatively easy to identify concerns and complaints. One need only ask. The product of such an inquiry is valuable anecdotal and subjective information – based on the experience of lawyers, masters, judges and court staff – regarding symptoms in need of attention. The greater challenge is to accurately diagnose the problems and develop solutions. It is difficult to know whether a particular problem is one of perception that may be remedied with better information, or one that requires rethinking of basic principles.

To take a concrete example, lawyers assert that the need to repeatedly seek court approval drives up costs and frustrates counsel. Masters indicate that they are inundated by requests to approve timetables or convene case conferences, and that they require additional staff resources. Court staff raise concerns about excessive "churning" of files and an inordinate number of events that require booking, tracking and data entry. Judges report frequent occurrences of counsel attending at Trial Scheduling Court unprepared to set trial dates.

It is difficult to reach consensus as to the primary cause(s) of these concerns, be it the conduct of counsel, inadequate information and education, micromanagement of timelines, data entry errors or administrative delays, court staffing issues, rule design or processes layered on top of the rule; likely each of these factors plays a role. However, there is agreement among those consulted that the practice of case management in Toronto is producing an unsustainable level of work, not all of which advances the goals of a system intended to be faster, fairer and less expensive.

With a general consensus that the number of court appearances should be reduced where feasible and that such appearances should be productive, it is possible to consider mechanisms for accomplishing this goal without diminishing a case managed system. Case management arose from joint recommendations by the bar, bench, government and public, all of whom recognized the need for the court to play a greater role in supervising the progress of civil actions. Not only does the overriding objective of rule 77 remain sound, it is worth noting that the Discovery Task Force recommended that it be adopted as the overall purpose of the Rules of Civil Procedure.

The Committee has observed that some of the concerns about the effectiveness of the current case management model may be attributed to two important factors.

First, the Civil Justice Review envisaged a dramatic shift from lawyer-managed cases to co-management by the bar and bench supported by the administration. It was anticipated that

lawyers raised in the tradition that they alone controlled the progress of their cases would find it difficult to accept judges and masters as co-managers. Hence, when masters were appointed they were cautioned that lawyers would be reluctant to accept the concept of co-management. Irrespective of this resistance, masters were charged with ensuring the expeditious flow of civil proceedings. At the outset, the emphasis was on case management masters telling lawyers how their cases should proceed.

Perhaps in focusing on moving cases forward, we have lost sight of the bar's partnership role in the co-management scheme. Case management is designed to be a cooperative venture among all participants. It is presumed that lawyers act in the finest traditions of their profession, making best efforts to move cases towards a fair disposition. The judicial branch must recognize and respect lawyers' expertise in determining a reasonable course for litigation. The bar and bench must work together – with the support of court staff and a shared database of case tracking information – to bring cases expeditiously to a just determination while allowing sufficient time for the conduct of the proceeding.

Secondly, the current timelines are ideals that are not realistic for many cases. The case management rule was drafted to reflect timelines that had met with apparent success in Ottawa. As the Committee has learned from consultations, in Ottawa these timelines are recognized as ideals and are not strictly enforced. Until more realistic timelines are established, judges and masters must, when provided with basic case information and absent strong reason to the contrary, accept reasonable timetables prepared by counsel and allow consent extensions to proceed.

While the Committee acknowledges that case management and mandatory mediation timelines may need to be reconsidered, it is not within our mandate to recommend such changes at this time. Our mandate is limited to implementation issues in the Toronto Region.

Any proposal to modify timelines requires consultation and consensus among all affected regions. Moreover, given our relative inexperience with case management, immediate changes would be premature. As our experience with case management grows, and as the impact of our recommendations and those of the Discovery Task Force[5] are felt, a consensus should emerge among the regions on the most appropriate timelines. The Committee recommends that a longer-term review be undertaken in this regard. In the interim, we propose a variety of solutions to address problems that have arisen in Toronto.

Some of the recommendations in this Report call for the suspension of certain provisions in rules 24.1 and 77. We recognize that this may be problematic in that it creates processes that are inconsistent with portions of those rules. On the other hand, certain immediate changes are imperative in order to improve the operation of case management in Toronto. As noted above, it

[5] The Discovery Task Force was appointed in 2001 by the Attorney General and the Chief Justice of the Superior Court of Justice to review of Ontario's civil discovery process, identify problems and recommend reforms. The Report (released in November 2003) recommends the incorporation of enhanced cost and time saving mechanisms into the Rules of Civil Procedure and the development of a "best practices" manual on the conduct of discovery. Electronic copies of the Report are available at: http://www.ontariocourts.on.ca/discoveryreview/index.htm.

would be inappropriate to entrench such changes into the rules on a province-wide basis without first having monitored their impact in Toronto and before consulting all affected regions. Moreover, we are sensitive to the difficulty and confusion that is caused by frequent rule changes.

To balance these concerns, the Committee proposes that the Regional Senior Justice and the Case Management Steering Committee consider several possible mechanisms for implementing the changes. These may include administrative changes or the establishment of a pilot project pursuant either to a Practice Direction or to Toronto-specific rule changes.

Relationship with Other Working Groups

The Regional Senior Justice has set up a number of other committees that are delving with greater detail into some of the issues touched upon in this Report. These include a committee on Trial Scheduling Courts, chaired by Justice R. Juriansz, a committee on pre-trials, chaired by Justice J. Macdonald, and a committee on motions, chaired by Justice I. Nordheimer. Justice C. Campbell is also considering the matters affecting long civil trials.

In addition, the Discovery Task Force has recommended the development of "best practices" for the completion of discovery related timelines. It is expected that these best practices may differ between different types of civil litigation including personal injury, wrongful dismissal, medical malpractice and construction cases. Best practices timelines will likely prove to be an important and useful resource to inform the question of realistic and appropriate timetables not only for discoveries but also for case management and mandatory mediation generally.

Accordingly, the Committee offers the information, discussion and recommendations of this Report to the Regional Senior Justice and the Case Management Steering Committee for their consideration. Of necessity, the Regional Senior Justice will balance the recommendations of this Committee with the advice he receives from other committees.

PART II: RECOMMENDATIONS

(A) LONGER-TERM RECOMMENDATION FOR REVIEW OF RULES 24.1 & 77

[1] Recommend the Regional Senior Justice propose a province-wide reconsideration of:

- The timing of mandatory mediation under rule 24.1; and
- The timelines of the 150 day/240 day provisions under rule 77.

Rationale

It is important that mandatory mediation occurs when litigants have sufficient information to make an informed decision as to a fair resolution of the litigation and before legal costs preclude early and fair resolution. Lawyers, masters, and courts administration agree that for many cases, the early mediation prescribed in rule 24.1 is not realistic, resulting in many requests for extensions. The 60-day consent postponement of mediation was obtained in approximately 54% of cases in 2003. Orders for extensions of time to complete mediation beyond the 60-day consent period were made in approximately 40% in 2003.

Similarly, case management timelines have proven more idealistic than realistic. A significant number of cases are unable to meet the timelines resulting in an excessive number of extension motions brought by counsel, heard by masters, and administered by court staff. This raises the question as to whether court resources are most effectively utilized by scheduling, hearing and processing requests for extension.

As noted in Part I of this Report, the timelines for both case management and mandatory mediation should be realistic. As more experience is gained with case management and recommendations of this Committee and the Discovery Task Force, it would be appropriate to determine more realistic timelines reflecting the time required for the average case to proceed through the system. This reconsideration should be carried out by an adequately resourced committee of bench, bar and ministry representatives in consultation with all affected regions, and informed by the "best practices" guidelines recommended by the Discovery Task Force.

(B) Short-Term Recommendations for Toronto

(i) Mandatory Mediation

[2] Revise administrative mediation procedures as follows:

- Eliminate the notices currently sent by the local mediation coordinator:
  - (a) courtesy notice advising counsel their case is subject to mediation; and
  - (b) notice of assignment of mediator sent to the mediator only.
- Adopt a new notice of assignment of mediator to be sent by the local mediation coordinator to counsel, self-represented litigants and the mediator 21 days prior to the effective date of the assignment.
- Permit parties to file form 24.1A selecting their own mediator provided they serve it within the 21 days on the mediator assigned by the local mediation coordinator.

Rationale

The process of assigning mediators appears to be a major cause of frustration, cost, and work for counsel and parties, masters, court staff and roster mediators. This recommendation would streamline the process and provide flexibility for litigants.

The courtesy notice currently sent to counsel advising them that their case is subject to mandatory mediation is no longer necessary, as virtually all civil actions in case management are subject to mediation. The Committee endorses the provision of such information though a Case Management Information Package (discussed in Recommendation # 30 below) that will replace this warning. The costs saved by eliminating the preparation and mailing of the current notices can be used to defray any additional expense related to the preparation and mailing of the proposed notice of assignment of mediator.

The mediation coordinator is mandated to assign a mediator from the roster if the parties have not filed form 24.1A selecting their own mediator within 30 days of the first defence being filed. That notice of assignment is sent only to the mediator, and not to the parties or their counsel. The assigned mediator therefore bears the responsibility of advising the parties or their counsel and fixing a date for the mediation within the time limit provided by the rule (90 days from the filing of the first defence).

There is also an element of unpredictability in the assignment process. An assignment may be delayed as a result of workload or technology issues. Further, frequently parties have filed or attempted to file form 24.1A, which has crossed in the mail with the notice of assignment. This requires the parties to bring a motion to replace the assigned

mediator with one of their own choosing. The masters usually grant an order replacing a mediator, but require the parties to pay a cancellation fee to the assigned mediator. Roster mediators are put to expense and frustration by this process and often are drawn into an adversarial relationship with counsel. The costs of litigation are unnecessarily increased.

To address this problem, the Committee recommends that advance notice of a proposed assignment be provided to all counsel, self-represented parties and the mediator 21 days prior to the effective date of the assignment. The notice would further allow parties to file form 24.1A naming another mediator at any time within the 21 days. The advance notice would serve to inform the mediator that the assignment might not come into effect, and notify counsel and parties that they can still select their own mediator if they act promptly. This would reduce expense, administration, and frustration.

[3] **In standard track cases, extend the time frame for mediation from 90 to 150 days and eliminate the requirement for a 60-day consent postponement of time for mediation.**

Rationale

The rule provides that in standard track cases, the parties may obtain a postponement of mediation for up to 60 days upon filing a consent with the mediation coordinator. Statistics show that this postponement is now requested in more than 50% of cases. Counsel must obtain and file the consent, and the mediation coordinator must track and enter data for every postponement request. The mediator must be advised of the postponement, and frequently mediation dates must be rescheduled. Postponement requests create an unnecessary burden on lawyers and court staff, without providing a reasonable benefit to the litigants.

The Committee proposes that, for the time being, all standard track actions be deemed to have been granted the 60-day postponement without the necessity of a filed consent. This need not delay cases that wish to proceed on an expedited basis, because, under the rules the court has the jurisdiction to abridge the time and order an earlier mediation.

[4] **In calculating the timeframe for holding mediation, begin counting from the date the mediator is selected or assigned, rather than from the date the first defence is filed (i.e. 150 days from the date the mediator is selected or assigned for standard track cases; 90 days from the date the mediator is selected or assigned for fast track cases).**

Rationale

For various reasons, the appointment of the mediator is occasionally late. The time for holding mediation, however, continues to run. There have been cases where the mediator is appointed well into the 90-day period. In those circumstances, the parties must either scramble to meet the deadline or must seek an extension. This also occurs when a case that was not originally subject to case management becomes subject to the rule (eg. rule 76 cases, non-case managed actions transferred in, out-of-town actions transferred to Toronto). Running the time to enforcement of the deadline from the date

the mediator is appointed would make mediation within the time limit more practical and would reduce the number of cases requiring a court order. Resources would be freed for other purposes.

[5] **Suspend the assignment of mediators for third party claims.**

Rationale

There are frequent complaints that the mediator assigned for a third party claim is different than the mediator assigned for the main action. Even if court staff are scrupulous in ensuring that the same mediator is assigned, the third party claim under the rules has different time limits than the original action. It seldom makes sense to mediate the third party claim separately from the main action, because in most cases, either the third party claim is issued at a time when the third party can participate in the mediation in the main action or after that mediation has already occurred. The vast majority of exemption orders have been for third party actions. The simplest solution is to refrain from automatically applying and enforcing rule 24.1. The court would deal with mediation of the third party claim at a case conference in the main action.

The issue of third party claims should be addressed as part of the longer-term reconsideration of mandatory mediation proposed in Recommendation # 1.

[6] **Develop procedures to ensure that different mediators or masters are not assigned to related actions.**

Rationale

There are procedures in place but they are not always effective. This is a frequent complaint from the bar. In light of the proposal to appoint a master when the claim is issued, current procedures will require revision in any event. The scope of those procedural revisions should be referred to the administration for recommendations.

[7] **Requests for mediation extensions should be given great deference when counsel, and their clients, agree on a mediation timetable that appears to be reasonable.**

Rationale

If parties and their counsel are able to agree on a timetable for the action, including the timing of mediation or other alternative dispute resolution procedures, the Committee is of the view that the masters should accept such an agreement unless it produces an unreasonable result. While counsel ought to address the criteria in rule 24.1 when requesting an extension of time, the burden of meeting those criteria should not be onerous.

The Committee recognizes that the objective of the rule is to have mediation occur as early as is practical in the litigation process in order to encourage cost-effective resolution of disputes. It also recognizes, however, as is evident from the number of extension requests, that the current timelines for mediation are ideals that cannot be achieved in a

large number of cases. The rule's objective may be better served by granting extensions to parties than by forcing them to attend a mediation that is premature.

[8] **Use simple standardized forms (such as those reproduced at Appendix 8) and standardized procedures to obtain approval of consent requests to extend time or to obtain other orders in respect of mandatory mediation.**

Rationale

The Toronto masters, with the concurrence of the Regional Senior Justice, as well as the masters in Ottawa and Windsor, have developed a standard form of timetable and case conference request form in response to the bar's concerns about inconsistency in masters' approaches and to streamline the process for obtaining simple approvals and time extensions. The Committee supports this approach as well as the use of "in writing" and telephone case conferences in appropriate cases. The Regional Senior Justice, with the masters, may wish to consider monitoring use of the standardized forms to assess whether further forms or procedures are indicated.

[9] **Request the Local Mediation Committee to consider (a) issues relating to retainer agreements used by roster mediators and (b) what, if any, steps can be taken to encourage experienced mediators to remain on the roster.**

Rationale

Members of the bar have indicated that the need to review retainer agreements creates additional costs for litigants. Further, the variation in retainer agreements used by mediators causes confusion. In addition, some members of the bar have expressed concern about the perception that a number of experienced mediators have removed themselves from the roster.

The Committee recommends that these matters be referred to the Local Mediation Committee for consideration, as these aspects of mandatory mediation are not within our mandate.

(ii) Case Management

[10] **Appoint a case management master to each action when the claim is issued.**

Rationale

Currently, when a case management master is assigned to an action on an individual calendaring basis he or she is administratively seized of the action until trial. The master conducts all case conferences and hears all masters motions. (Emergency matters are referred to a duty master, who can be reached through the scheduling unit.)

Presently, litigants must contact the scheduling unit to have a master appointed and then, in many cases, must contact the master's registrar to obtain a case conference. Appointing a master at the outset of each case would eliminate one step and would also obviate the

need for judges in Trial Scheduling Court to appoint masters to actions. Other benefits would include early identification of related actions or conflicts of interest.

Under the current system, masters' appointments are made in rotation by the scheduling unit, counter staff, Trial Scheduling Court and Call Over Court. This requires procedures to ensure the rotation of masters from these various offices is fair and balanced. Under the proposed system, masters would be assigned by counter staff when the claim is issued, and both parties would know which master to contact at the pleadings stage.

While this recommendation may result in the appointment of masters for undefended actions and for actions that never require a master, the benefits of reducing workload for counsel and court staff would be significant.

[11] **Encourage use of standard forms for timetable and "in writing" case conferences (reproduced at Appendix 8). Disseminate these standard forms through the Case Management Information Package and on a website. See Recommendation # 30.**

Rationale

This is an extension of Recommendation # 8. The bar is familiar with these new forms, which have been distributed by the registrars and at Trial Scheduling Court during the past year. Standardized forms are optional and simplify the process, and provide consistent information for users of the court system.

Currently, masters use a stamped endorsement on letter requests for simple extensions or timetable variations. It is not the intent of this recommendation to eliminate the simplicity of that process or to make the forms mandatory. Standardized forms, however, will be a valuable tool that litigants and lawyers may use at their option.

[12] **Encourage early litigation timetabling and filing of a consent timetable as needed to support a request for extension of time.**

Rationale

When the parties confer and agree on a litigation plan and timetable at an early stage, they can also review the default times in the rules and determine what extensions of time are required. In many cases, submission of a consent timetable immediately after the pleadings are exchanged may be the only court approval that is required, and an in person case conference may be unnecessary. The masters have already adopted a form of "in writing" case conference by means of a suggested timetable form (See **Appendix 8**). Filing of consent timetables should be encouraged and promoted.

In cases where the parties cannot agree on a timetable or there are complex issues that may benefit from immediate court involvement or supervision, the parties will identify the need for an early case conference. This permits active case management to focus on cases where it is needed.

[13] **Eliminate mandatory timetable filing after mediation in Toronto, as required by subrules 77.10(2) & (3).**

Rationale

These subrules require the parties to file a consent timetable within 30 days after mediation. They were enacted primarily at the request of the Toronto Region and do not apply in Ottawa. The requirement to file a timetable, even if it complies with the times in rule 77, has proven to be unnecessary. While "in writing" case conference timetables should be encouraged as the mechanism to obtain simple scheduling orders, mandatory filing 30 days after mediation has proven not to be readily enforceable. The primary purpose of these subrules was to eliminate Trial Scheduling Court appearances where cases were not ready to set a trial date. This purpose will be achieved by implementation of other recommendations.

[14] **Requests for timetable extensions should be given great deference when counsel, and their clients, agree on a timetable that appears to be reasonable. In such instances, case conferences solely for timetabling should only be scheduled at the request of counsel or where the proposed timetable does not appear to be reasonable.**

Rationale

To achieve the goals of case management, the timetabling of cases must balance the objective of bringing cases expeditiously to a just disposition with that of flexibility to meet the timing needs of each case. The bar, bench and administration concur that, for a significant number of cases, the prescribed timelines are more idealistic than realistic. This has led to a great number of requests for extensions. Such requests, if not granted on consent, add considerable cost and delay for the litigants and contribute to the unmanageable workload assumed by the case management masters.

The proposed recommendation would recognize the joint responsibility of the bench and the bar to ensure that cases proceed at an expeditious but reasonable pace.

[15] **Request the Regional Senior Justice to:**

- **Phase out Trial Scheduling Court for all case managed and non-case managed actions; and**
- **Set trial dates at settlement conferences for case managed actions.**

  OR

- **If it is not feasible to phase out Trial Scheduling Court for case managed actions, consider an alternative regime for scheduling settlement conferences and trials appropriate for the Toronto Region.**

Rationale

During the transition to 100% case management in Toronto, Trial Scheduling Court (TSC) was established as a temporary measure to schedule pre-trials (settlement conferences and trial management conferences) for non-case managed actions. As an interim measure, the 10-25% of case managed actions were also scheduled for settlement conferences and trial at TSC. TSC has since become the method of setting trial dates for all case managed and non-case managed actions. Rule 77, on the other hand, contemplates that trial dates for case managed actions are to be set at settlement conferences.

Moreover, TSC has evolved to the point where the scheduling of trials is no longer its primary function. TSC has transformed from a safety net for non-case managed actions into a court chiefly devoted to identifying cases in breach of case management timelines and ensuring that those timelines are met. This was not its intended role. Not infrequently, cases appear in TSC on three or more occasions, which delays the progress of litigation, inconveniences counsel and adds expense for litigants.

Approximately 235 cases weekly are scheduled for TSC. Only about 10% of these are ready to set settlement conference and trial dates. If TSC were phased out, masters or judges would be required to hold approximately 24 additional settlement conferences weekly. While this is not currently feasible, it may become increasingly so if the other recommendations in this Report are implemented.

The rationale for the rule 77 requirement that the trial date be set at a settlement conference was to ensure that trial dates be scheduled only for actions that do not settle at the settlement conference, that are in compliance with the rule and that are actually ready for trial. The current practice of setting the trial date at TSC means that because most cases resolve prior to the scheduled trial many more trials are scheduled than are actually heard. Accordingly, the Toronto Region trial lists are not representative of cases that are both ready for and likely to proceed to trial.

The Committee recommends that TSC be phased out as Toronto establishes a system for scheduling trial dates at settlement conferences. This recommendation would make scheduling practices consistent with the objective of rule 77. We recognize that this goal can be accomplished only with adequate numbers of settlement conference judges and masters, and with the availability of trial dates in reasonable proximity to the settlement conference. This would also require the development of a new scheduling model that would allow for easy but accurate assignment of trial dates, based on the estimated trial length. The trial scheduling "capacity list" would need to be redesigned and data entry protocols developed. Accordingly, a transitional period will be required to carry out this recommendation. The Committee further recommends that if rule 77 cannot be implemented in Toronto Region as it was designed, consideration be given to a regime more suited to Toronto trial scheduling needs.

[16] **Replace Call Over Court and Trial Transition Court appearances with Status Courts (rule 48.14) held quarterly or as determined by the Regional Senior Justice.**

Rationale

Call Over Courts (COCs) were established to deal with the roughly 45,000 dormant outstanding non-case managed actions. As a transition measure, COC identified many actions that had been resolved. In recent months, as more recent actions have been called in, COC has transferred large numbers of actions into case management. The system is unable to absorb those cases with the current level of resources. As an interim measure, COCs no longer transfer cases into case management or to a case management master. They will continue until they have reviewed all pre-July 2001 actions. Thereafter, any continuing appearances may be scheduled into proposed Status Courts.

It was never the intent to order all outstanding non-case managed actions into case management and it would be untenable to do so. At the same time, there should be a process in place to ensure that non-case managed actions do not languish indefinitely and that we do not develop a new "black hole" that will itself require a future round of Call Over Courts.

Under rule 48.14, where an action has not been placed on a trial list or disposed of within two years after the filing of a statement of defence, the registrar shall serve on the parties a status notice. Upon receipt of the notice, any party may request a status hearing. The registrar will dismiss the action for delay unless within 90 days of the notice, the action is set down for trial or terminated, or a judge presiding at a status hearing has ordered otherwise. At the status hearing, the plaintiff must show cause why the action should not be dismissed for delay.

[17] **Set settlement conference dates for case managed actions in accordance with the case timetable, reasonably proximate to available trial dates, at the reasonable request of the parties, or at 365 days after the filing of the first defence.**

Rationale

There seems to be little point in hurrying cases through trial preparation and forcing them to a settlement conference unless trial dates are available within a reasonable time thereafter. Currently they are not. The success of case management is predicated on the availability of trial dates. Ottawa schedules settlement conferences in accordance with the availability of a master or judge to conduct the conference, and available trial dates. The Committee recommends a similar approach for Toronto, always subject to accommodating requests from counsel for earlier settlement conferences.

[18] **Where a settlement conference is delayed significantly beyond timelines set out in the rules, counsel should be provided with 90 days' notice of the settlement conference.**

Rationale

The settlement conference brief required by rule 77.14 is a substantial document that includes summaries of evidence and extracts from expert reports. By the time of the settlement conference, the parties must be trial ready. If settlement conferences are not scheduled at the 240-day mark as contemplated by rule 77, it would be reasonable to provide sufficient notice to allow counsel to prepare. Counsel generally need 90 days' notice of a settlement conference date.

[19] **Consider the possibility of a transition rule for Toronto Region based on rule 77.17 to provide for administrative dismissals of all non-case managed proceedings not listed for trial by a certain date.**

Rationale

Rule 77.17 is a transition rule passed for Windsor's transition to rule 77. Ottawa previously had a transition rule. Toronto now should give consideration to such a rule.

The transition rule would work much like rule 77.08. Any action commenced in Toronto region and not subject to rule 77 would be administratively dismissed if not set down for trial by a set date, for example July 1, 2005 or such other date as determined by the Regional Senior Justice. Parties would have warning of this date well in advance. If cases could not reasonably be trial ready by that date, counsel could seek an appropriate extension or a transfer to case management. This would direct limited resources to only cases that need intervention.

On the other hand, Justice Wilkins has advised that, based on the COC experience, this change would impact negatively on self-represented litigants, and their rights would not be adequately protected by the right to set aside such a dismissal. Further, the administration must be cognisant of the resources that would be needed to process requests for trial dates. These concerns should form part of the Regional Senior Justice's consideration.

[20] **Suspend enforcement of case management timelines to actions initiated by notice of application unless and until a trial of an issue is ordered. Consider seeking a rule change for this purpose.**

Rationale

Applications are currently subject to case management. Integration into case management is, however, difficult. In the normal course, the applicant must obtain a return date for the application, which then governs the timetable or counsel seek a case conference to establish a timetable. The automatic timelines under rule 77 are not of assistance to applications. The Committee proposes that if a trial of an issue is ordered, any party may ask that the matter be subject to case management. Only at that point would the application become subject to active case management, and a timetable developed.

[21] **Consider minimizing transfer of non-case managed cases from other regions into Toronto case management, at least on a temporary basis.**

Rationale

Increasing numbers of Toronto counsel appear to be asking judges in other regions to transfer actions to Toronto and into case management. The masters are simply unable to bear the resulting increase in workload. It is the Committee's understanding that, historically, cases were only transferred between regions after consultation among the affected Regional Senior Justices. We recommend that the Toronto Regional Senior Justice raise this issue with colleagues in other regions to minimize such transfers at this time of critical importance for the implementation of case management.

(iii) DELAY REDUCTION

[22] **Prioritize reduction of delays in access to court appearances and support initiatives by the Regional Senior Justice to seek methods for shortening delays for all court appearances.**

Rationale

As noted in our Interim Report of June 23, 2003, attached at **Appendix 9**, the Committee indicated that the mounting delays in obtaining court dates are of increasing concern. For case management to succeed in its objectives, the courts must be able to provide litigants with timely access to justice. If cases are expeditiously readied for a particular court appearance, but then are significantly delayed in obtaining a court date, case management will have failed. There is a substantial negative impact on acceptance of case management if litigants are told to "hurry up and wait".

Apart from the generally negative reflection on case management, a delay requires counsel to put the file aside for a period, during which time they lose some familiarity with the details. Circumstances may also change requiring updating of the foundational materials. It then takes the lawyers time – and their client's money – to re-educate themselves on the litigation for a later court appearance and to update their preparation.

As of December 2003, the delays for obtaining court dates were as follows:

Masters' motions		February 2004
Masters' long motions		March/April 2004
Masters' case conferences		February 2004
Masters' simplified rules		April/May 2004
Masters' settlement conferences		May 2004
Judges' motions		January 2004
Judges' long motions		March/April 2004
Judges' settlement conferences		March/April 2004
Judges' trials:	1-5 days	Immediately available subject to pre-trial availability
	6-10 days	Late 2004 – early 2005
	>10 days	Late 2005 – early 2006

We recognize that the trial list delays arise in part from the confluence of both case managed and non-case managed actions that are ready for trial at the same time. As a

result of 100% case management implementation, cases are ready for trial earlier. At the same time, the non-case managed inventory had worked its way through the litigation process and Call Over Court, and is now also ready for trial. The two types of trials are now in Toronto's inventory, creating a civil backlog, at least temporarily.

Ultimately, the question of how to reduce delays for court appearances is in other hands and does not fall within the mandate of this Committee. We note that the Regional Senior Justice and his team leader judges are currently considering the issue of timely access to justice, in particular with respect to judges' motions and trial dates. Former Regional Senior Justice Blair has struck Toronto Region subcommittees to address various issues. Further trial slots have been added to the judicial calendar to provide earlier trial dates and to counter the increasing adjournment and settlement rates of cases on the eve of trial. Justice Campbell, the team leader for long trials, has outlined a pilot project to improve court availability for longer trials, including the assignment of all personal injury cases to a designated team. We understand the Regional Senior Justice is reconsidering the definition of a "long trial" and reconfiguring trial scheduling so that trial delays are more balanced for all lengths of trial. The Regional Senior Justice may consider the need for a Toronto Region civil blitz and the need to return to running trial lists.

Justice Nordheimer is reporting separately to the Regional Senior Justice with recommendations for judges' motions court. The recently released Report of the Discovery Task Force provides recommendations that may assist with the flow of motions. Administrative Master MacLeod is suggesting initiatives to reduce delays for appearances before the masters. Justice J. Macdonald and Justice Himel are making recommendations with respect to judicial pre-trials and settlement conferences. Justice Juriansz chairs a committee on Trial Scheduling Court. Justice Wilkins is charged with responsibility for Call Over Courts.

We commend any initiatives to reduce the current delays and emphasise the essential importance of timely dates to a case management system. In the meantime, masters and judges, in setting case management timetables, will want to take the fact of these delays into consideration.

[23] **Seek the bar's support to reduce adjournments and cancellations.**

Rationale

Judicial and master resources are ineffectively used when lawyers book court appearances that are cancelled or adjourned on short notice. Preliminary statistics indicate that only 20% of scheduled trials proceed. Approximately 25% of settlement conference dates are cancelled.

While there are many legitimate reasons for adjournment and cancellation, including settlement of a case, last minute cancellations result in a loss of court time and poor allocation of judicial and master resources. They also contribute to the problem of delays in obtaining court dates.

Lawyers should be encouraged to set court dates that are realistic and to notify the court of any requested adjournments so that the scheduled court time may be reallocated to another matter. Bar organizations should address these issues through newsletters and other communications with their members.

[24] Assign new dates for cancelled settlement conferences or transfer them over to quarterly Status Courts for timetabling.

Rationale

Where lawyers do not file material or appear at a settlement conference, it is adjourned without a future court date. With no "next appearance" date, the case goes into a "black hole." Further, when parties who have a fixed trial date do not attend a settlement conference, the trial date itself may be put in peril. In such situations, the Committee recommends that a new settlement conference date be assigned, or that the case be scheduled into a quarterly Status Court for timetabling.

[25] Proactively monitor and evaluate case trends in order to anticipate backlogs.

Rationale

In addition to the confluence of case managed and non-case managed actions that are ready for trial at the same time, as described earlier, other factors contribute to the development of backlogs. For example, there appears to be an increase in the complexity of cases on the trial list. While the Committee has heard that that there has not been a significant increase in the absolute number of motor vehicle actions initiated, we are aware that such actions generate a disproportionate amount of work for masters in the way of motions and for judges on the long trials team. The addition of accident benefits and long-term disability carriers to such litigation has caused unexpected delays and complexities. This is exacerbated by an impression, not yet confirmed by statistics, that these types of cases usually resolve on the eve of trial.

The Regional Senior Justice may wish to consider protocols for data collection and monitoring to plan for future backlogs. If the court and administration are aware of a potential backlog and the reasons for it, steps can be taken in advance to plan for its impact on initiatives such as case management.

It is recommended that statistical information in the nature of Appendix 5 be provided to the Regional Senior Justice, the Administrative Master and the Case Management Steering Committee as requested, but at least quarterly. In this way, trends can be identified.

[26] Set ideal goals for the availability of motions and case conference dates and monitor those goals regularly to ensure they are being achieved.

Rationale

A case management master should ideally be available for court hearings within a reasonable time proximate to a request, for example within three weeks for a case

conference, one month for a regular motion, four months for long motions and six weeks for settlement conferences.

The Committee recognizes, however, that these timeframes are ideals that cannot be achieved with the masters' current workload. We simply put them forward as a yardstick to later measure the results of the implementation of this Committee's recommendations. Further, we acknowledge that there will always be an ebb and flow to litigants' needs for access to masters. The suggested timelines should be reviewed and revised from time to time as necessary and may inform the question of the appropriate masters' complement.

[27] **Encourage assignment of interested pre-triers to settlement conferences and trial management conferences.**

Rationale

When the bar assisted with the Toronto civil backlog blitz in the 1990s, the bench undertook a project to assign judges interested in that area of work to settlement conferences.

[28] **Consider elimination of the distinction between judges and case management judges currently found in the Rules of Civil Procedure.**

Rationale

There is a question about the jurisdiction of judges from other regions to transfer cases into Toronto case management or to make any order in a case managed proceeding. The rules only provide for such transfers by case management judges or masters (see rule 77.11 which is quite specific). Motions in a proceeding governed by rule 77 may only be heard by a case management judge or a case management master (see rule 77.12 (1)). "Case management judge" is specifically defined in rule 77 to be "the judge or a member of a team of judges assigned to manage a proceeding".

At an early stage, all Toronto judges were designated as case management judges for the purpose of this rule. Problems arose when a non-Toronto judge sitting in Toronto granted relief in a case managed action. To prevent any concern about invalidity, the Regional Senior Justice designated that judge as a member of the case management team *nunc pro tunc*.

Difficulties now arise when non-Toronto judges transfer cases into Toronto as case managed actions. Apart from all other issues, there is no mechanism to deal with such orders that would not add unnecessary expense to the cost of litigation. This issue would be resolved if all judges had unquestioned jurisdiction to make orders on case managed actions. The question of inter-regional case transfers can be dealt with through inter-regional protocols.

[29] **Review the complement and caseload of case management masters.**

Rationale

There is widespread recognition that masters are working to capacity and beyond. The bar has called for the appointment of additional case management masters. Implementation of the Committee's recommendations should, to some extent, alleviate the masters' workload. Case management will, of course, suffer if there is an insufficient number of case management masters to reasonably serve its purposes. The Committee recommends a review of the case management masters' caseload and complement in light of implementation of the recommendations in this Report.

(iv) Information and Education

[30] **Provide a Case Management Information Package on case management and mandatory mediation at the commencement of proceedings, and require the plaintiff to serve a Case Management Information Package on each defendant with the statement of claim. In addition, make this package available on a website. (A draft Case Management Information Package is attached at Appendix 10.)**

Rationale

This proposed package is part of the recommendation to appoint masters when the claim is issued and to provide key information about case management and mandatory mediation at the outset of the action. The Case Management Steering Committee has approved this recommendation, and a draft of this package has been circulated to the bar. The Committee continues to fully support such a package, which will advise the parties:

- whether the case is fast or standard track
- the judicial team assigned to the action
- the master assigned to the action
- the contact information for the master
- the procedure for booking motions and case conferences
- the timelines in rules 24.1 and 77; and
- a reminder of the availability of individual calendaring under rule 77.09.1.

This information will assist in compliance, reduce reliance on courtesy notices sent by the court, enhance consistency, assist self-represented litigants and assist out-of-town counsel. It should also result in the reduction of telephone inquiries and motions and case conferences required by parties who inadvertently find themselves in non-compliance with the rules.

The Committee cannot overemphasize the benefits of making all information and the case management forms available on a website. In that way current information is readily available and accessible to litigants and to the bar.

[31] **Implement a system by which roster mediators make their qualifications and special interests known to litigants and the bar on a website.**

Rationale

The roster consists of a list of mediators who have been screened by the Local Mediation Committee to ensure they meet minimum qualifications established by the Ministry of the Attorney General. The Local Mediation Committee has been reluctant to include professional qualifications or credentials on the roster due to difficulties in verifying the information provided by mediators. As a result, litigants and counsel do not have access to information on the background, qualifications or interests of roster mediators.

This information, if readily available, would enhance use of the roster and help to address the perception by some lawyers about the qualifications of roster mediators. Further, the roster would be more helpful and have greater acceptance if counsel were able, as they have requested, to match mediators and their interests with specific kinds of disputes.

[32] **Provide access to a website with information regarding the payment of roster mediators, including ancillary and travel charges by roster mediators and retainer agreements.**

Rationale

While these matters may have been addressed elsewhere, these issues continue to cause confusion for lawyers, litigants and mediators. Clarification of these matters or broader dissemination of information by the mandatory mediation programme would be of assistance.

[33] **Maintain and regularly update a website to provide relevant information on Toronto case management and the availability of court appointments.**

Rationale

It is fundamental to the success of case management that litigants and counsel have easy access to information about its processes. An easily located, regularly updated website is essential. Currently, some information is provided on the Attorney General's website, and some is provided on the Superior Court website. In addition, counsel should be able to access information on available court dates via a website pending the ability to schedule court appearances electronically, which is also recommended.

We recognize that the question of the appropriate website is currently subject to consideration by others. It would not be appropriate for this Committee to comment on that issue. What we can say is that the absence of accessible website information is hampering the acceptance and implementation of case management in Toronto Region.

[34] **Initiate a case management phone tree to provide information and guide callers to informed staff to assist with case management questions.**

Rationale

A great deal of time is currently spent by court staff answering questions and there is not necessarily consistency in the answers provided because the question may be variously asked of the scheduling unit, counter staff, a manager, or the masters' registrars. A phone tree would not only ensure the right question was referred to the right source, but could also provide standard answers to frequently asked questions.

[35] **Develop a Frequently Asked Questions (FAQ) list and make the answers available on a website, at court offices, and through the case management newsletter.**

Rationale

As noted above, there is a need for greater efficiency and consistency in responding to the many questions that are posed to court staff by litigants and lawyers. The bar identified inaccurate information as a major source of concern. Staff members identified frequent requests for information as a major impediment to the orderly processing of their work. The availability of answers to commonly asked questions would address both of these concerns.

[36] **Disseminate information about the Case Management Steering Committee and its work.**

Rationale

One comment heard from the bar was a request for a case management "users committee." This suggests that the existence, composition and mandate of the Case Management Steering Committee are not well known or understood. The website should contain information about the Committee and, in particular, about the bar representatives.

[37] **Consider better dissemination of information through resources such as the Law Society of Upper Canada email network.**

Rationale

Distribution of case management information by various bar organizations – Advocates Society', Toronto Lawyers' Association, Canadian Defence Lawyers, Ontario Bar Association Civil Litigation Section – only reaches their members. The Law Society by contrast can reach every member of the profession, and apparently has the capability to target distribution to all Toronto lawyers. The Regional Senior Justice may consider using this capability, which has been offered by the Law Society, for the dissemination of important and appropriate information to Toronto litigators.

[38] **Continue bar education through the case management newsletter and additional columns in the bar organizations' individual newsletters. In collaboration with bar organizations, provide updated continuing legal courses on case management in Toronto.**

Rationale

Through these resources, lawyers would benefit from regular updates and practical tips about case management concepts and how to resolve procedural problems.

[39] **Remind lawyers of the availability of rule 77.09.1.**

Rationale

Upon request to the Regional Senior Justice under rule 77.09.1, individual calendaring with a judge is available in appropriate cases based on the criteria set out in the rule. Such appointments may well include the involvement of a case management master at the judge's discretion. There have been very few requests under this rule in contrast to the non-case managed equivalent of rule 37.15. (In the calendar year of 2003 (as of December 12), only four such requests had been made.) The Committee is of the view that rule 77.09.1 could be utilized more frequently.

[40] **Implement a protocol for communication between counsel or self-represented litigants and the court.**

Rationale

The informality of case management causes some confusion about the kinds of communication appropriate with a master or judge. As an example, the masters report that they are frequently copied by counsel on correspondence to an opposing party demanding compliance with an order. Requests for case conferences sometimes inappropriately address the merits of the action or a motion. Both the volume of correspondence and what to do with it are problematic. For example, when are letters to the judiciary acceptable and do these letters form part of the court file? The Committee recommends that this be addressed by a written guideline.

[41] **Inform lawyers of the potential limitations and appropriate use of real time motions.**

Rationale

The bar has expressed an interest in "real time" motions, particularly with respect to discovery issues. The Committee takes this to mean that lawyers wish direct access to a master from and during an examination for discovery. Real time motions obviously pose scheduling problems, but are being accommodated by masters upon request where reasonable. The bar must feel free to raise this issue with the particular master in charge of the file, and to discuss the procedural mechanics of bringing a motion without the benefit of written materials and the appeal limitations of that method of proceeding.

[42] **Disseminate information to the bar about the procedure for obtaining an urgent appointment with a master if the assigned master is not available.**

Rationale

The bar has requested access to an alternate master when the assigned master is unavailable to hear a particular matter. It appears that more information is needed

regarding the procedures for urgent motions and case conferences. Each day, a duty master is designated. Arrangements may be made to attend before the duty master or another sitting master by contacting the scheduling unit. This information should be provided to the bar and included on the website as well as through the phone tree recommended above.

[43] **Provide information to the judiciary about case management, including the importance of case histories and timetabling.**

Rationale

Case management is relatively invisible for most Toronto judges. Traditionally and currently, judges only see a case when they are assigned to hear a particular motion, settlement conference, or trial. These hearings are normally considered in isolation and the judge is unlikely to again encounter the particular action. In this way, judges are, for the most part, unfamiliar with the course of the particular litigation as a whole. Accordingly a judge may not recognize the importance of a particular event or appearance or the impact of the event on the schedule established for the action. Ongoing provision of information to the judiciary would assist in refreshing judges about the principles of case management, familiarizing them with the importance of case histories scheduled timetables, and reminding them of the importance of settlement conferences.

[44] **Review, amend, and consolidate related Practice Directions.**

Rationale

The multitude of Practice Directions is seen as a source of confusion and inconvenience for the bar and court staff, particularly when outdated Practice Directions continue to be posted or reproduced by legal publishers. The Committee has been advised that the Office of the Chief Justice and the administration are taking preliminary steps to address this matter.

The Committee recommends the development of a consolidated Practice Direction for Toronto for all areas of practice, which is updated regularly and made available on a website.

(v) RESOURCES

[45] **Assess streamlining potential and staffing needs of the Mandatory Mediation Office to meet workload.**

Rationale

The Mandatory Mediation Office has been unable to meet the increased workload and has, in addition, experienced personnel changes that have impeded optimum effectiveness. The move from a pilot project to a permanent programme and the expansion to 100% case management have led to increased demands on court staff. It is anticipated that the Committee's recommendations should moderate the workload of the office; following their implementation, staffing levels should be reassessed and reconsidered.

[46] **Implement ongoing staff training and staff training manuals.**

Rationale

Ongoing staff training with respect to the case management system and processes are essential. Staff manuals are also essential for consultation by staff to obtain answers to questions and to maintain consistency.

[47] **Support and train masters' registrars to make better use of electronic communications.**

Rationale

Training registrars to use electronic communications will help to facilitate the bar's access to masters. Currently there is some inconsistency in the practices of different registrars and there is no developed protocol for electronic communication.

[48] **Appoint a case management coordinator for a two-year period.**

Rationale

There is an immediate, although perhaps short-term, need for a case management coordinator in Toronto who would be available to the bar, bench, and court staff to resolve case management-related problems. This person would coordinate the provision of updated staff manuals and training, suggest topics for the case management newsletter, manage FAQs, coordinate case management information for the website and advise the court manager and Regional Senior Justice's executive assistant regarding information needed by the bench, bar and staff. The coordinator would be familiar with the procedures of all relevant administrative offices. As such, he or she could expeditiously resolve difficulties and recommend procedural changes to enhance the administration of case management. The existence of the coordinator would be brought to the attention of the bar, and the coordinator would ensure that a reasonably prompt response is provided to bar inquiries.

[49] **Prioritize software amendments to allow the implementation of these recommendations.**

Rationale

The court staff are dependent upon the SUSTAIN software to alert them to appoint a mediator or to refer a case of non-compliance to a master. The software also cross-references cases to ensure the same master and mediator are appointed in related actions. The masters are also dependent on accurate case histories produced by SUSTAIN.

Some of the recommendations set out in this Report will require revision of SUSTAIN time standards and writing of new reports. Allocation of information technology resources to SUSTAIN is needed on a priority basis, both for these recommendations and to remedy difficulties with SUSTAIN that are known to the administration and to the masters.

PART III: CONCLUSION

Although still in its infancy, case management has already begun to have a positive impact on the speed of disposition. The available data, while limited, demonstrates that under rule 77 more cases have been resolved in a shorter period of time than was previously the case. Case conferences have proven to be an effective, informal means of resolving disputes. Timetabling is seen as a helpful tool for keeping cases on track.

Case management and the case conference process have proved successful in reducing many procedural motions such as pleading amendments, trial together or security for costs. Those issues may often be resolved without the expense and delay occasioned in the traditional litigation process. The process of individual calendaring with the assigned case management master, and in appropriate cases with a specific case management judge, are further benefits of the case management system.

In spite of these successes, there are a number of pressure points that have led to concerns among all participants in the system. These must be addressed to preserve the integrity of case management, and the Committee is grateful for the constructive suggestions that have been provided by those consulted to assist in this process.

In particular, the Committee wishes to highlight the importance of flexibility in timetabling, ensuring all appearances are productive, reducing delay, streamlining administrative processes, and disseminating information through an interactive website. We are hopeful that the recommendations in this Report will address the "growing pains" inherent in the expansion to 100% case management in Toronto and enhance the efficacy of this civil justice initiative.

PART IV: LIST OF RECOMMENDATIONS

(A) LONGER-TERM RECOMMENDATION FOR REVIEW OF RULES 24.1 & 77

[1] Recommend the Regional Senior Justice propose a province-wide reconsideration of:

- The timing of mandatory mediation under rule 24.1; and
- The timelines of the 150 day/240 day provisions under rule 77.

(B) SHORT-TERM RECOMMENDATIONS FOR TORONTO

(i) MANDATORY MEDIATION

[2] Revise administrative mediation procedures as follows:

- Eliminate the notices currently sent by the local mediation coordinator:
  - (c) courtesy notice advising counsel their case is subject to mediation; and
  - (d) notice of assignment of mediator sent to the mediator only.
- Adopt a new notice of assignment of mediator to be sent by the local mediation coordinator to counsel, self-represented litigants and the mediator 21 days prior to the effective date of the assignment.
- Permit parties to file form 24.1A selecting their own mediator provided they serve it within the 21 days on the mediator assigned by the local mediation coordinator.

[3] In standard track cases, extend the time frame for mediation from 90 to 150 days and eliminate the requirement for a 60-day consent postponement of time for mediation.

[4] In calculating the timeframe for holding mediation, begin counting from the date the mediator is selected or assigned, rather than from the date the first defence is filed (i.e. 150 days from the date the mediator is selected or assigned for standard track cases; 90 days from the date the mediator is selected or assigned for fast track cases).

[5] Suspend the assignment of mediators for third party claims.

[6] Develop procedures to ensure that different mediators or masters are not assigned to related actions.

[7] Requests for mediation extensions should be given great deference when counsel, and their clients, agree on a mediation timetable that appears to be reasonable.

[8] Use simple standardized forms (such as those reproduced at Appendix 8) and standardized procedures to obtain approval of consent requests to extend time or to obtain other orders in respect of mandatory mediation.

[9] Request the Local Mediation Committee to consider (a) issues relating to retainer agreements used by roster mediators and (b) what, if any, steps can be taken to encourage experienced mediators to remain on the roster.

(ii) CASE MANAGEMENT

[10] Appoint a case management master to each action when the claim is issued.

[11] Encourage use of standard forms for timetable and "in writing" case conferences (reproduced at Appendix 8). Disseminate these standard forms through the Case Management Information Package and on a website. See Recommendation # 30.

[12] Encourage early litigation timetabling and filing of a consent timetable as needed to support a request for extension of time.

[13] Eliminate mandatory timetable filing after mediation in Toronto, as required by subrules 77.10(2) & (3).

[14] Requests for timetable extensions should be given great deference when counsel, and their clients, agree on a timetable that appears to be reasonable. In such instances, case conferences solely for timetabling should only be scheduled at the request of counsel or where the proposed timetable does not appear to be reasonable.

[15] Request the Regional Senior Justice to:

- Phase out Trial Scheduling Court for all case managed and non-case managed actions; and
- Set trial dates at settlement conferences for case managed actions.

  OR

- If it is not feasible to phase out Trial Scheduling Court for case managed actions, consider an alternative regime for scheduling settlement conferences and trials appropriate for the Toronto Region.

[16] Replace Call Over Court and Trial Transition Court appearances with Status Courts (rule 48.14) held quarterly or as determined by the Regional Senior Justice.

[17] Set settlement conference dates for case managed actions in accordance with the case timetable, reasonably proximate to available trial dates, at the reasonable request of the parties, or at 365 days after the filing of the first defence.

[18] Where a settlement conference is delayed significantly beyond timelines set out in the rules, counsel should be provided with 90 days' notice of the settlement conference.

[19] Consider the possibility of a transition rule for Toronto Region based on rule 77.17 to provide for administrative dismissals of all non-case managed proceedings not listed for trial by a certain date.

[20] Suspend enforcement of case management timelines to actions initiated by notice of application unless and until a trial of an issue is ordered. Consider seeking a rule change for this purpose.

[21] Consider minimizing transfer of non-case managed cases from other regions into Toronto case management, at least on a temporary basis.

(iii) Delay Reduction

[22] Prioritize reduction of delays in access to court appearances and support initiatives by the Regional Senior Justice to seek methods for shortening delays for all court appearances.

[23] Seek the bar's support to reduce adjournments and cancellations.

[24] Assign new dates for cancelled settlement conferences or transfer them over to quarterly Status Courts for timetabling.

[25] Proactively monitor and evaluate case trends in order to anticipate backlogs.

[26] Set ideal goals for the availability of motions and case conference dates and monitor those goals regularly to ensure they are being achieved.

[27] Encourage assignment of interested pre-triers to settlement conferences and trial management conferences.

[28] Consider elimination of the distinction between judges and case management judges currently found in the Rules of Civil Procedure.

[29] Review the complement and caseload of case management masters.

(iv) Information and Education

[30] Provide a Case Management Information Package on case management and mandatory mediation at the commencement of proceedings, and require the plaintiff to serve a Case Management Information Package on each defendant with the statement of claim. In addition, make this package available on a website.

[31] Implement a system by which roster mediators make their qualifications and special interests known to litigants and the bar on a website.

[32] Provide access to a website with information regarding the payment of roster mediators, including ancillary and travel charges by roster mediators and retainer agreements.

[33] Maintain and regularly update a website to provide relevant information on Toronto case management and the availability of court appointments.

[34] Initiate a case management phone tree to provide information and guide callers to informed staff to assist with case management questions.

[35] Develop a Frequently Asked Questions (FAQ) list and make the answers available on a website, at court offices, and through the case management newsletter.

[36] Disseminate information about the Case Management Steering Committee and its work.

[37] Consider better dissemination of information through resources such as the Law Society of Upper Canada email network.

[38] Continue bar education through the case management newsletter and additional columns in the bar organizations' individual newsletters. In collaboration with bar organizations, provide updated continuing legal courses on case management in Toronto.

[39] Remind lawyers of the availability of rule 77.09.1.

[40] Implement a protocol for communication between counsel or self-represented litigants and the court.

[41] Inform lawyers of the potential limitations and appropriate use of realtime motions.

[42] Disseminate information to the bar about the procedure for obtaining an urgent appointment with a master if the assigned master is not available.

[43] Provide information to the judiciary about case management, including the importance of case histories and timetabling.

[44] Review, amend, and consolidate related Practice Directions.

(v) Resources

[45] Assess streamlining potential and staffing needs of the Mandatory Mediation Office to meet workload.

[46] Implement ongoing staff training and staff training manuals.

[47] Support and train masters' registrars to make better use of electronic communications.

[48] Appoint a case management coordinator for a two-year period.

[49] Prioritize software amendments to allow the implementation of these recommendations.

APPENDICES

APPENDIX 1

MORE MASTERS, MORE ACCESS, MORE UNDERSTANDING

A Report from

The Advocates' Society on Case Management

I. Introduction

Case Management came into effect on July 3, 2001 for all civil cases in Toronto. It came into effect in Ottawa in January 1997.[1] The impetus to implement case management evolved from the recommendations of the Civil Justice Review [2] and pilot projects which were carried out in Toronto, Windsor and Sault Ste. Marie. Key elements of the case management regime were to avoid delays in litigation and reduce costs to litigants. The purpose of case management is set out in Rule 77.02. The four objectives are:

- to reduce unnecessary cost and delay
- to facilitate early and fair settlements
- to bring cases to a prompt and fair result
- to provide sufficient time for the conduct of the case

The objectives of case management are laudable. The real question is whether or not they are being achieved.

The case management regime enshrined in Rule 77 came about as the result of considerable consultation between the Bench, the Bar and the Attorney General's office. Bar organizations including The Advocates' Society prepared reports on case management which were submitted before the implementation of case management to 100% of civil cases in Toronto. The Advocates' Society Report [3] contained 12 recommendations among which were recommendations regarding resources and flexibility. Specifically, with respect to resources, The Advocates' Society Report stated:

> "There needs to be a clear and equivocal commitment from the ministry that there will be sufficient funding available to ensure that all resources necessary to achieve the goals of case management will be met. These resources must encompass not only the technology and case management masters but also the necessary courtrooms, hearing rooms, registrars and administrators. *Case management will not work just*

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[1] Case management is governed by Rule 77. Those types of cases which are excepted are set out in Rule 77.01

[2] Civil Justice Review, First Report, 1995, Hon. Robert A. Blair and Sandra Lang, Co-Chairs; Civil Justice Review, Supplemental and Final Report, 1996, Hon. Robert A. Blair and Heather Cooper, Co-Chairs

[3] Report of The Advocates' Society Case Management Committee, The Advocates' Society, June 1999

because it is called case management. It will only work if all needed resources are committed to it. It will not work if they are not."[4] [emphasis added]

With respect to flexibility, the Report recommended:

"The Society recommends that practice directions or an amendment to Rule 77 provide that case management masters and judges consider all factors in the approval of a timetable and that such criteria be applied consistently. *The guiding principle of case management should not be the imposition and enforcement of time lines for the sake of forcing cases through the system.*"[5]

Indeed, these recommendations were echoed by other Bar groups who were also concerned that there be sufficient resources and flexibility to reflect the needs of cases and the litigants.[6] In the summary of these reports it was noted: "A case management system will only receive the unqualified support of the Bar if it is provided with the judicial, administrative, technological and financial resources necessary to ensure its efficient operation." [7]

After two years of case management in Toronto and over 5 years in Ottawa it is time to evaluate the system and see if the goals and objectives of case management are being met.

II. Case Management Implementation Review Committee ("CMIRC")

Regional Senior Justice Blair has established the CMIRC to review the status of case management in Toronto and make recommendations for change. The CMIRC is comprised of Madam Justice Lang as chair and representatives of the judiciary, the Bar and the Attorney General's office. Specifically, the mandate of CMIRC is to consider these questions: what is working? what is not? how do we make what is not working well work better? In order to answer these questions the CMIRC will consider case management techniques and practices (how case management is administered at all levels); the interconnection between case management and mandatory mediation; timeliness and the number of attendances required in case management; and, resources and how they are utilized.

The CMIRC has requested input from various Bar organizations.

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[4] *Ibid.*, p. 19

[5] *Ibid.*, p. 19

[6] Case Management Statement of the Executive of the Civil Litigation Section, C.B.A.O., May 10, 1999; Metropolitan Toronto Lawyers Association Submission to the Toronto Case Management Steering Committee, May 1999; and Report of the Ontario Trial Lawyers Association on Case Management, May 1999.

[7] Summary of Bar Position with Respect to Implementation of Case Management, "Reports of the Bar on Case Management", June 1999.

III. The Survey

In response to the request for submissions by the CMIRC, The Advocates' Society established a Task Force to review case management and seek input from the membership. Although the CMIRC was established to review case management only in Toronto, the Society's task force sought input from all members about case management in all jurisdictions.

A survey was prepared[8] and circulated to approximately 2480 active members of the Society. Members were asked to indicate to which jurisdiction their comments related. In total, 223 responses were received. Of these, approximately 200 responses related to Toronto while 18 commented on Ottawa. Few comments were received regarding Windsor.[9] As well, a large percentage of members included comments regarding what was, and, what was not working in case management.

The responses also reflected opinion from a wide range of years of experience:

Year of Call	
pre-1980	43 replies
1980 – 1989	64 replies
1990 – 1999	66 replies
2000 – 2003	47 replies[10]

IV. Issues

There are three main themes that dominate the survey responses. They are:

- mandatory mediation
- resources
- flexibility

While other issues are referred to such as timeliness of motions, delays in obtaining dates, numbers of attendances, untrained staff, increase of costs, inconsistency of decisions and practice, more bureaucracy, the comments about these issues tend to fall into one of the three main themes.

V. Question 4 - Toronto

Question 4 of the survey sought to elicit opinions on the basic elements of the operation of case management. The question asked for members' experience with a number of standard events in case management ranging from timeliness of dates

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[8] Attached as Schedule A

[9] There were only two responses relating to Windsor. As for the Windsor experience, it will not be commented on in this Report although many of the observations regarding case management are applicable to any jurisdiction.

[10] The total of these replies is 220. Three replies did not provide a year of call.

for various events such as motions, case conferences etc. to mandatory mediation and interaction with case management administration.

The responses received relating to experience in Ottawa and Toronto are starkly different. It is quite apparent that across the board, Ottawa enjoys a far greater satisfactory rating than does Toronto.

4 (i) Timeliness of Dates

Generally speaking, the availability of dates for motions before case management masters garnered the most criticism and unsatisfactory responses. Over 100 members were critical of the delays encountered in getting motions before a CM Master in a timely fashion - in several cases members commented that it took upwards of 6 to 8 weeks to get a date from some CM masters. These delays run counter to the objective of case management and were seen by several respondents as contributing to the creation of backlogs and an inability to move the case forward.

Dates for motions before judges, however, were far more satisfactory, as were dates for urgent motions, case conferences, settlement conferences and trial.

The responses to Question 4 (i) are summarized on Chart 1.

4 (ii) Motions Without Notice

A large percentage of respondents offered no comments on motions without notice. Generally, those that did respond indicated that they were satisfactory. The responses to Question 4 (ii) are summarized on Chart 2.

4 (iii) Mandatory Mediation

More than any other topic, mandatory mediation generated the greatest response. It is obviously a topic that members feel strongly about. For the most part, members were very critical of mandatory mediation prior to production and discovery.

However, while a great deal of dissatisfaction was expressed regarding mandatory mediation generally,[11] the actual number of members who were able to choose or change a mediator, or obtain an extension of time, or had success in reaching settlement or narrowing issues, were close to even or exceeded those who were dissatisfied. For example, 81 responses indicated that the ability to change mediators was unsatisfactory, but 72 found it to be satisfactory or better. In choosing a mediator, only 53 members were dissatisfied while 127 provided a satisfactory or better response. On reaching settlement or narrowing issues those who found mandatory mediation to be unsatisfactory were 78 and 75 respectively. Those who found it to be satisfactory or better were 90 and 80 respectively. Nonetheless, mandatory mediation was the focal point of over 70 specific comments and criticisms as discussed below.

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[11] See Section VIII.

The responses to Question 4 (iii) are summarized on Chart 3.

4 (iv) Dealing with Case Management Administration

The responses to these questions were mixed. A very substantial number of members (107) found e-mail to be very satisfactory compared to those who did not (29). Voicemail responses from the case management unit garnered heavier criticism as 63 members said they were unsatisfactory while 64 found them to be satisfactory. Obtaining information from the case management unit was also found to be satisfactory by 118, members while 59 found it be unsatisfactory.

The responses to Question 4 (iv) are summarized on Chart 4.

However, this topic also generated a significant amount of commentary in the comments section of the survey. There were strong negative views expressed about the knowledge of case management staff.

VI. Question 4 - Ottawa

While the number of responses from Ottawa was relatively small given the number of members who practice in Ottawa,[12] the responses were starkly different than the Toronto responses. The Ottawa Bar perceives case management in a much more positive light than the Toronto Bar.

On Charts 5 through 8, the responses from Ottawa practitioners are summarized. It is readily apparent that the satisfaction quotient across the board is much higher. For example, across the board the responses regarding timelines are overwhelmingly positive.[13]

VII. Overall Experience with Case Management

The most startling result in the survey was in response to the question regarding overall experience with case management. Of those responding to the question, 100 provided a negative answer, 59 had a positive response and a further 25 had no comment. This seems to be an anomalous result given that the answers to Question 4 were by and large more satisfactory than not. What seems to be clear from the survey generally is that while members are satisfied with certain aspects of case management, overall the system needs to be revamped particularly as it relates to mandatory mediation, timeliness of dates and flexibility.

Ottawa practitioners are very supportive of their case management regime as is evident from Chart 10.

The responses relating to Toronto are summarized on Chart 9.

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[12] The number of members is approximately 250 and the number of responses was 18.

[13] See Chart 6.

VIII. Mandatory Mediation

The largest number of responses to the survey on any one topic concerned mandatory mediation and its timing. There were over 70 responses which criticized the timing of mandatory mediation. Virtually everyone offering comments on this topic observed that mandatory mediation is ineffective before production and discovery. While many personal injury practitioners were vocal in their criticism of early mandatory mediation so too were commercial litigators and general civil litigators.

One typical criticism was the fact that early mandatory mediation is expensive and unhelpful, particularly in personal injury cases. Without the necessary medical information defence counsel and plaintiff's counsel cannot fully and fairly assess the case and determine an appropriate settlement. As was noted, the preparation time for mediation is significant and adds unnecessary cost and delay to the action if the mediation session is unsuccessful because of the lack of relevant information.

Some members criticized decisions made by CM Masters regarding timetabling of mediation as being unresponsive to the needs of the case and the litigants as well as having a general lack of understanding of the needs of personal injury cases, particularly catastrophic injuries. In general, the consensus was that mandatory mediation be held later in the action and that, rather than simply having mandatory mediation occur within an arbitrary number of days, a case conference be convened to review the timing of mediation.

Even in cases where counsel are prepared to proceed with mediation in accordance with Rule 24.1, there are procedural and timing issues which add costs, delay and frustration. Typical of the comments is situations in which roster mediators are appointed while counsel have been negotiating among themselves for the appointment of a mediator of choice only to be met with cancellation fees and court attendances to extend the time for mediation. Requests for extensions of time to conduct the mediation are becoming routine and add significantly to the workload of CM Masters. While it is fairly easy to obtain the initial extension of 60 days,[14] further extensions to accommodate availability of non-roster mediators or production of documents or information essential to the mediation require Form 77C's and potential court attendances.

There are also technical glitches in the operation of Rule 24.1 that cause grief to counsel and litigants. These include the appointment of roster mediators in third party proceedings where mediation in the main action is already organized. Case management does not track both the main action and the third party action together. Similarly, where actions with common parties and issues that are ordered to be case managed together, different mediators may be appointed in each action to the consternation of counsel. While these matters may seem trivial and easy to sort out, the very fact of their existence adds costs for the parties who pay counsel and their staff to prepare the requisite Form 77C or to attend at case conferences.

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[14] See Rule 24.1.09

In one recent case[15], CM Master Albert noted:

> "The roster mediation program is relatively new and experiencing growing pains. The integrity of the program requires all participants in the process to conduct themselves reasonably. Several friction points arise in the mandatory mediation program, including when:
>
> (a) the roster mediator is appointed so early that not all related actions are ready, and,
>
> (b) excessive administrative time is spent by a mediator trying to schedule the mediation.
>
> "Common sense suggests that mediation has a greater opportunity for success when the parties select their mediator and conduct the mediation at an appropriate stage in the litigation." [16]

However, these issues need not arise if the mandatory mediation program and case management were better coordinated to track third party proceedings with the main action and to track companion actions together.

IX. Resources

The second major issue that garnered a considerable comment was the availability of resources in the case management office and access to CM Masters in a timely manner. There are 11 CM Masters in Toronto and 6 traditional Masters. The CM Masters, in addition to their case management responsibilities, also assist on construction lien matters and hearing motions in non-case managed actions. They are not able to devote the entirety of their time to case management. It is clear from responses to the survey that the numbers of CM Masters in Toronto is insufficient given the growing length of time to obtain dates for motions and conferences.

Many members observed that delays in getting dates for motions and conferences is leading to backlogs and delays in the progress of litigation. Delays of as much as 6 to 8 weeks have been experienced. More than 41 members considered the

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[15] B & M Handelman v. Landau Realty, [2003] O.J. No. 2679 (CM Master Albert)

[16] *Ibid.*, pars. 7 – 8. The case dealt with a non-case managed action that was ordered to be case managed together with an existing case managed action. They were also to mediated together. A roster mediator was appointed for only the case ordered into case management. The roster mediator tried to convene a mediation even though counsel advised him that the case was to be mediated with another case for which another mediator was selected by the parties. A case conference was convened to sort out the mediation procedure and deal with a cancellation fee of $300 requested by the roster mediator. The CM Master reduced the fee to $100 and made the following observation:

> "Mediators must use common sense when scheduling mediations. It is counsel's responsibility to take the necessary steps to obtain an order extending time sufficiently in advance of the deadline to prevent unnecessary scheduling of mediations in cases that are not ready to proceed. However, this does not always occur. Rather than increase delay, expense and administrative steps required when counsel are delinquent in their responsibilities, as they were in this case , mediators need to know that the court does not expect them to unilaterally fix a date for mediation when counsel have taken steps to obtain relief from the court." [par. 16]

response time for inquiries for motions and case conferences to be inordinately slow.

Further, several members commented that staff at the case management office are overworked and lack sufficient knowledge of procedure. Because of lack of resources, dates for case conferences or motions were difficult to obtain in a timely manner. Clearly, more resources are required to ensure that matters requiring judicial intervention are able to be dealt with promptly, otherwise timelines and timetables become hollow as there is no readily available mechanism to enforce them.

The growing delay in obtaining dates from CM Masters for case conferences and motions is a serious problem which threatens the viability of case management.

X. Flexibility

"One size does not fit all" – is one of the catch phrases of the responses dealing with the way in which case management operates. Indeed, many members criticized the rigidity of the system and the timelines prescribed in Rule 77.[17]

The right balance has not yet been struck between the timelines in Rule 77 and the needs of litigants and their counsel. For example, one common complaint was that CM Masters failed to recognize the pressures of practice and that if counsel could work out a timetable that accommodated their availability, then that timetableshould be shown more deference by CM Masters. A number of members noted that being told that they should "turn work away" if they cannot meet timetable deadlines was unacceptable.

Others viewed the 240 day time limit of the standard track as too aggressive and believed it should either be lengthened or CM Masters should recognize the reality of cases, determine a reasonable pace for the case and be less rigid in pushing cases through the system. This latter point garnered a significant number of responses,[18] one of which observed that the system appeared to be more important than the interest of the litigants and that it was the litigants serving the system not the system serving the litigants.

Some felt that some CM Masters were too rigid and "micro-managerial" in their approach to timelines and there was a lack of consistency in the way case management was being applied. One example was the different motion procedures that different CM Masters have developed. No specific example was given but several responses commented on the need to do things differently for different CM Masters and a general lack of flexibility in dealing with CM Masters. One common criticism was that case management appears to deny access to the courts because it increases the steps in litigation and rewards those who increase the number of

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[17] Over 55 responses criticized the timelines as too short to reflect the needs of cases.

[18] Over 40 members criticized the "hurry up and wait" mentality associated with case management. CM Masters were perceived as pushing the cases through only to be met with delays in getting trial dates at trial scheduling court, especially for long trials.

conferences and hence increases costs. There is also a perceived arbitrariness to the timelines imposed by CM Masters where events such as discoveries and motions are fixed with little regard to the availability of counsel.

Others criticized the paperwork of case management and the bureaucracy that runs case management. Several members commented that there was too much paperwork and too much bureaucracy and that the Commercial List procedures worked better.

Another topic of comment was staffing at the case management office. A number of responses commented on the lack of knowledge of those working in the office; that they would not accept motions because the documents were not completed in the manner they thought they should be. These administrative problems have lead to complaints of increased costs because more attendances are necessary and more lawyer time is used up on organizing, scheduling and administering.

That is not to say, however, that there is not a substantial number of members that believe that the implementation of case management has been beneficial. Where there is difficulty in dealing with counsel on a case or being able to move the case forward a number of members believed case management to be of great assistance.

XI. The Ottawa Experience

The recurrent themes regarding the Toronto experience include insufficient flexibility and more bureaucracy that is driving up the cost of litigation. A sub-theme of the flexibility issue is the question of the timing of mediation.

The recurrent suggested solutions are to scrap case management and/or mandatory mediation or to apply more resources.

The experience in Ottawa is markedly the opposite. Importantly, the survey discloses that both Toronto counsel and Ottawa counsel make the same observation about both experiences. The conclusion, at least according to our survey, is that case management is working well in Ottawa and not in Toronto.

That the Ottawa experience is perceived as being successful comes as no surprise, it has been well received from its inception. The questions then are: Why are these differences occurring and what can be done about it?

As a primary observation, often great pains are taken to explain why the Ottawa experience cannot work in Toronto – Toronto is too big, the Ottawa Bar is more collegial, Master Beaudoin is one of a kind. Frankly, the veracity of these assertions is questionable and one would probably be hard-pressed to demonstrate how they prevent case management from working in Toronto. More importantly, a preferable approach should be to find out what it is about the Ottawa experience that can work in Toronto as opposed to why it cannot.

The suggestion that the solution lies entirely in more resources is not borne out by the statistics. Toronto has approximately four times the case volume as Ottawa. In Ottawa, there is one CM Master and in Toronto there are eleven. In addition, the

CM Master in Ottawa also presides over the majority of settlement conferences whereas the CM Masters in Toronto do not. It is recognized, however, that CM Masters in Toronto do have responsibilities for non-case managed cases. But if insufficient resources is one of the root causes for difficulties in the system in Toronto, then on these numbers the Ottawa system should have failed by now. What the Ottawa system demonstrates is a method of utilization of resources and a flexible approach which seems to work.

Statistics respecting civil litigation in North America demonstrate a common reality: 95% to 97% of cases settle at some point in the litigation. The approach which the Case Management Committee in Ottawa took (and the provisions of Rule 77 arise out of the Ottawa process) was, if these cases were inevitably going to settle, why not implement a system which would assist them in doing so as soon as possible. Those cases would be resolved more quickly and at less expense to the litigants. It would also allow a smoother path to trial for the 3% to 5% of cases that inevitably are tried.

Case management and mandatory mediation provide the necessary levers for the court to assist the parties toward resolution or trial. The underlying purpose of each 'touching' of the file is to break down barriers to settlement and at the same time allow the parties to move quickly to trial. The key is flexibility.

It is clear that the members of the Bar both from Toronto and Ottawa are very satisfied with the approach taken by Master Beaudoin. That he is a very capable CM Master goes without saying but he does not have a monopoly on making case management work. His approach is quite exportable.

Case Timetables

For the most part, counsel in Ottawa are allowed to set their own schedule with very little interference. As a result, most case timetables are set quickly and without much contention. Master Beaudoin observes that counsel are in the best position to know how long it will take for productions, discovery, undertakings, etc. to be completed. Furthermore, it is much easier to enforce a timetable which was agreed to by counsel as opposed to one imposed on them. He will intervene if counsel cannot agree or if there has been abuse of the flexibility granted. As a result, timetable issues usually take up very little time in case conferences (and indeed are most often achieved in writing or brief telephone conferences).

Interlocutory Matters

The CM Master encourages counsel to bring interlocutory matters to a case conference as a first step. The majority are resolved in that context, informally and expeditiously. The only matters which tend to be determined by motion are those for which the answer is not obvious. If a motion is required, the CM Master (through potential costs sanctions) establishes a hierarchy in the manner of how it is to be heard – counsel are encouraged to consider motions in writing as a first option. If oral argument is necessary and if counsel are from out of town, they should utilize a telephone conference motion prior to insisting on being physically present. The result of all of these steps is less process, less delay and less cost.

Mandatory Mediation

Master Beaudoin is flexible as to when mediations will take place but exemptions from mediation occurs rarely. If parties require more information by way of production or discovery, then that will be accommodated if it is reasonable. It is accepted that there is no point in imposing a mediation on the parties until they are ready and they and their counsel are in the best position to indicate when that is. Again, reasonableness must prevail and all parties' requests are tested against that standard. The CM Master listens to what the parties feel they need and makes suggestions as to how a timetable can be formulated. Parties are encouraged to undertake only as much production and discovery as is absolutely necessary to permit the mediation to proceed.

Even the fact that the mediation occurs close to the settlement conference does not pose a problem (some have even been scheduled, with successful results, after the settlement conference). They are different processes. A mediation allows for more participation by the parties; it allows for participation of non-parties (e.g. SAB insurers or LTD insurers) and allows for broader settlement possibilities.

In the Ottawa experience, the statistics demonstrate that mandatory mediation has had a major impact on the settlement of cases. Every opportunity to bring the parties and lawyers together increases the chances of resolution. It is perceived by all participants as a very important part of the success which has been witnessed in Ottawa.

Thus, while the Rules provide for mandatory mediation to occur early, that does not need to be slavishly followed. If the parties feel that an early mediation will not be meaningful, then why impose it? The approach is to set up a timetable which gets the critical information into the hands of the parties so that they will be in a position to discuss settlement.

General

In general, the approach Master Beaudoin takes is that he will work 'with' counsel and the parties as long as reasonableness prevails. He will intervene when it does not. His approach can be compared to an elastic band. He will give to a certain point but if the elasticity is stretched too far, then he will contract. In the end, it results in a self-controlling process - counsel have learned that if they are reasonable, there will be no resistance from the CM Master.

Through this approach it would appear that it takes much less of Master Beaudoin's time to control the process of each case. This would seem to be the principal reason why he is not only handling a larger caseload than the CM Masters in Toronto but is also able to conduct most of the settlement conferences. It would appear to be a more effective use of resources.

The Ottawa statistics demonstrate that the majority of cases are disposed of within 1 to 2 years after the action is commenced. The parties and counsel have consistently reported that this is more than acceptable.

While the Ottawa experience demonstrates that Master Beaudoin is very effective in single-handedly managing the Ottawa case load, there is concern that he may "burn out". Therefore, some consideration should be given to appointing another CM Master in Ottawa.

Trial Dates

One further distinguishing feature of the Ottawa system is that the trial date is set at the conclusion of the settlement conference. And it is a fixed date. If this can be accomplished in Toronto, it would help the process. As it currently stands, the CM Masters in Toronto are shepherding the parties toward a 240-day settlement conference only to have a bottleneck to obtain a trial date. It is resulting in a 'hurry up and wait' syndrome that makes the pressure imposed by the CM Masters seem even more needless.

XII. Recommendations

It is easy to criticize. It is more difficult to provide concrete constructive solutions. The commitment to a case management regime is one of the centrepieces of Civil Justice Review and there has been a significant investment in the resources and infrastructure of the case management regime. It is unlikely that it will now be dismantled. Thus, those members whose response for improvement to the case management regime was simply "scrap it" or some variation on that theme will not carry the day. However, case management in Toronto is experiencing problems that need to be fixed now before the integrity of the system is permanently damaged.

The following recommendations reflect the general views of the members of the Society. They can be summarized, insofar as Toronto is concerned, into three simple observations: more CM Masters, more access and more understanding.[19] Some recommendations for change may be more difficult to implement than others: some reflect the growing pains associated with the implementation of a new regime and may be cured over time when the participants learn the rules of engagement; while others require only a greater financial commitment and the immediate expenditure of funds to bolster the judicial and administrative resources, or alternatively, a better allocation of those resources. The recommended changes are:

1. More flexibility to be shown by CM Masters in dealing with timelines and the conduct of actions
2. More CM Masters
3. Improve the level of service to those using the system by providing more and better trained staff who understand the system

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[19] "More masters, more access, more understanding" was the simple anonymous comment by one member in response to the question asking for improvements to the system.

4. Create a telephone hotline for immediate answers to procedural questions on case management

5. Simplify procedures for counsel to amend timelines by filing an agreed upon timetable

6. Track ancillary proceedings (i. e. defendants by counterclaim and third party proceedings) as part of the main proceeding so that mediation and timelines are consistent in all associated proceedings

7. The requirement that mandatory mediation take place within 90 days of the filing of the first defence should be replaced with a requirement that counsel address the timing of the mediation in a timetable to be delivered at the outset of the case. The general rule should be that the mediation takes place as early as reasonably possible given the nature of the case.

8. Alternatively, the timing of the mediation should be reviewed and established at the first case conference in a case

9. Standardize retainer agreements among roster mediators

10. Reduce the paperwork and make it easier for litigants to chose a non-roster mediator by having litigants indicate at either a case conference or in the timetable whether a non-roster mediator will be used

11. Standardize documentation and develop consistency among the CM Masters relating to procedures for motions and establishing timetables

12. Improve the ability to electronically file documents

13. Set the trial date at the settlement conference so that Trial Scheduling Court is no longer necessary

14. The timelines for the conduct of an action on the standard track should be taken only as a goal for the simpler more straightforward type of case

15. Increase the use of teleconferencing, especially when counsel from outside the jurisdiction, Toronto or Ottawa, are involved

16. For complex cases with difficult discoveries make realtime motions available

17. Increased use of telephone case conferences to set timetables and deal with purely administrative matters

18. Ensure that mediators appointed from the roster have experience in the area of law in issue in the case

19. Provide access to an alternate CM Master in the event the CM Master assigned to the case is unavailable

20. Appoint a CM Master to a proceeding when it is commenced

21. Establish a permanent committee (similar to the User's Committee in the Commercial List) to be a liaison between the Bar, the Bench, the CM Masters and the CM Administration

XIII. Conclusion

Although case management began in Toronto with high expectations, its benefits and objectives have not yet been met. While there are many lawyers who appreciate that the system is seeking to make litigation more efficient and less costly, there are many in Toronto who would argue that it is burdensome and more costly for clients.

The Ottawa experience demonstrates, however, that Rule 77 case management is not only workable but also beneficial in the conduct of cases. This dichotomy between Ottawa and Toronto is difficult to reconcile. From the observations of members of The Advocates' Society it appears that flexibility is one of the key differences that allows the Ottawa approach to be more effective and accepted.

As noted in this report, there are obvious growing pains which have had a negative impact on the Bar's perception of the effectiveness of case management in Toronto. However, case management will remain a permanent addition to the practice of civil litigation in Toronto.

This report has been prepared to identify the main issues of concern to the Bar and to recommend improvements to the case management process.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

THE ADVOCATES' SOCIETY TASK FORCE ON CASE MANAGEMENT

Kevin R. Aalto
Chair – Toronto

Peter J. E. Cronyn
Co- Chair – Ottawa

APPENDIX 2

Ontario Trial Lawyer's Association Submissions re Case Management In Toronto

We acknowledge and thank you for the invitation to attend and participate in the consultation on Toronto case management, and giving us the opportunity to be heard.

We restrict our responses to those matters that are of particular concern to OTLA and its members and for which we feel OTLA possesses the appropriate expertise. We act primarily for individuals, and it is from that perspective that we make our comments concerning case management.

By way of background, we can advise that the Ontario Trial Lawyers Association (OTLA) is a group of Trial lawyers whose membership is restricted to Trial counsel and who overwhelmingly represent consumers and do not represent insurers. Our membership works for victims of injury to strengthen and preserve the rights of Ontario families and to make Ontario a safer, cleaner and better place to live. Our membership is largely comprised of the backbone of the legal profession: small firms and sole practitioners from across the Province. Unlike many legal organizations, less than half of our members are from Toronto. Nine years ago, our membership stood at 60, it now stands at close to 1000.

OTLA's mission is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice.

OTLA is judicially recognized for the expertise of its members in the areas of personal injury law and practice. OTLA has been granted status as an Intervenor in a number of cases where access to justice or matters of significant public policy have been involved.

We have consulted our members' views. The collective experience of OTLA members with case management in personal injury and medical malpractice cases in Toronto is negative. The following is a summary of the views that appear to be predominant:

1. **Earlier Trial Dates**

- Unless additional judicial resources are made available to try cases, the pressure on parties to comply with case management timetables is not justified.

- In motor vehicle, there is a requirement to meet the verbal threshold of serious and permanent. Permanency may not be determined medically until several years after the injury. Medical literature indicates that this is difficult to determine until the two-year mark.

- There is an access to justice issue when there is the potential of being forced onto trial in an action that is not yet ready for trial because the medical issues have not been determined, or the facts supporting the future loss of income claim are not fully developed. Given that a

personal injury action must assess all past and future damages in a lump sum, it is critical that litigants have an opportunity to prove their case.

2. **Earlier Settlement**

- Forcing the parties to comply with tight timetables does not mean that cases are necessarily ready to be settled any sooner.

- In a personal injury action involving a municipality or a medical malpractice action the limitation periods are short. Actions must be started to comply with a limitation period even though it is clear that the matter is not ready for resolution as there is insufficient information available concerning the consequences to the plaintiff.

- The timing of settlement depends, to a large extent, on factual developments in a personal injury action, which occur as the proceedings progress.

- Where there is considerable uncertainty as to future events, forcing the parties to the courthouse steps will not improve the settlement prospects. It often has the opposite effect of forcing the parties to proceed with a trial, as there is insufficient evidence in order to convince the opposite party of the probability of future events.

3. **Masters Involvement**

- Insufficient flexibility on the part of the masters.

- They have a tendency to refuse to accommodate the needs of the parties and their counsel.

- This is creating unfair and unreasonable demands to meet arbitrary timetables and deadlines.

- There is a lack of respect by the masters for the knowledge and experience of the counsel, who have a better appreciation for how the timing of the conduct of the action affects the specific issues in the case.

- Timing is being driven by quotas and the expectations of the court, rather than the factors affecting the particular case.

- Too much time is taken by case conferences, that are unnecessary.

- Many members complained that these are problematic, because they are time-consuming, unnecessary, and increase the cost without much benefit.

- Although telephone conferences rather than personal attendances are a welcomed use of resources.

- Lawyer's calendars are cluttered with routine case conferences, making it more difficult to schedule the substantive stages in the proceeding.

- There is a reasonable degree of cooperation among the personal injury bar, and counsel are usually capable of agreeing to reasonable schedules without assistance.

- Insufficient regard is given to the consent of counsel in scheduling matters, leading to additional case conferences. Cooperation among counsel should be encouraged and rewarded, not stifled.

4. **Mediation**

- Mandatory mediation occurs at too early a stage in the action, and the success rate for settlement before discoveries is low.

- It is a time-consuming process that is not useful until the parties understand the case and have an opportunity to explore the issues.

- In a personal injury case, the parties are simply not ready to have a meaningful settlement discussion, particularly because the presentation and credibility of the plaintiff is such an important element in the defendant's assessment of the damages.

- There is little willingness by the court to allow the mediation to be deferred to a point where mediation has a greater chance of leading to successful resolution.

- Early unsuccessful mediation can discourage the parties from participating in mediation at a later point, when it is more appropriate.

5. **Potential Solutions**

1. Exempt personal injury and medical malpractice actions from case management.

2. Create a sub-class for such actions to create separate rules and greater flexibility. Impose no timelines other than when the matter goes to trial scheduling court, unless the parties complain.

3. Allow case management in personal injury cases at the option of counsel.

4. Change the time for mandatory mediation to 90 days after initial discoveries are completed.

    a. Parties are more likely to negotiate in good faith after they understand the case they must meet, and have had an opportunity to assess the strengths and weaknesses of their own case.

    b. The timing will give parties an incentive to make early and full documentary disclosure. There will be only a short time in which to answer undertakings.

    c. It codifies the former practice, before such extensive documentary disclosure was permitted through discovery, which was to have settlement discussions immediately following discoveries.

5. Alternatively, allow either of the parties to personal injury actions to opt out of early mandatory mediation, and require it in such cases before the action may be set down for trial.

6. Introduce increased flexibility into the system to accommodate the individual needs of the litigants in each case, and in some cases, to reasonably accommodate sole practitioners or small firms without the resources to always respond promptly to the demands of case management. Litigants must have access to counsel with different levels of resources.

7. The delay in scheduling motions leads to some of the delay in proceedings. Increased availability of case management masters for substantive motions would assist.

8. Consider sanctions against defendants who delay, or are unreasonably unavailable.

Respectfully submitted by:

Diana Edmonds

on behalf of the Ontario Trial Lawyers Association

APPENDIX 3

Metropolitan Toronto Lawyers Association

Submission to

The Case Management Implementation Review Committee

The MTLA in its submission to the Toronto Case Management Steering Committee in May 1999 fully supported the implementation of 100% case management in the Toronto Region but did so with the caveat that successful implementation would have to meet two key criteria:

1. case management had to be administered in a timely manner (early intervention); and

2. case management had to be flexible in order to meet the demands of the lawyer, the client and the case, and only where necessary, provide for management on an individual calendaring basis.

The MTLA accepts that the early timetabling of actions has been helpful in getting and keeping cases on track but often the timetabling becomes a rigid exercise where the perception is one of form over substance.

The need to agree to or impose a timetable on counsel ought to take cognizance of the reality of the action and what the action requires rather than the court being able to say it has timetabled *x* number of actions over *y* period of time.

Tied to this issue is the concern about inconsistent application of the case management principles. Some masters are very attuned to the realities of the piece of litigation before them and show great flexibility in attempting to weigh the demands of the case against the demands of the lawyers and the parties. Other masters, unfortunately are not.

Because it is difficult to force substance over form, the MTLA believes as it originally submitted to the Steering Committee, that the rule ought to be amended to require the court to consider various criteria in determining an appropriate timetable rather than relying on the generic Rule 77.02 which sets out the general purpose of case management.

The court ought to be obliged to consider matters such as:

1. the amount in issue;
2. the complexity of the proceeding;
3. the number of parties;
4. the number of experts;
5. the importance of the issues,

when responding to a request by the parties to tailor the timetable to their case. The MTLA recognizes that certain masters clearly consider the aforementioned matters and others in determining an appropriate schedule; however, again, some masters do not.

A recurring complaint from the personal injury bar calls into question the 180 Day "Defence Due" Rule. A number of counsel have asked for the abolition of Registrar's Dismissal Deadline.

The complaint is that this case management deadline is an impediment to settlement and increases the cost of litigation.

The complaint of one of our members is aptly set out as follows:

> "It was obviously enacted without any consideration to plaintiffs who have ongoing personal injuries or defendants who are insured. It obviously applies strictly to the commercial litigators. The Statements of Claim are typically, in personal injury cases, issued close to the limitation period. This is because the plaintiff's lawyers want to have the chance to negotiate a settlement at an adjuster level. It is not true that the statement of claim is issued when it is apparent that settlement isn't possible at the adjuster level. Often, the claim is issued to protect the limitation period. This is especially true of car accident cases where often the plaintiff's counsel is waiting to see whether the plaintiff's claim meets the threshold. This is going to be even more true when the *Insurance Act* amendments come into effect which put the deductible to $30,000, which will make plaintiff's counsel even more leery to issue claims on behalf of clients who have serious but not yet obviously permanent whiplash claims.
>
> It is wrong to assume that when the claim is issued, it should immediately proceed to litigation and for a defence lawyer to be hired. Often, the claim is issued and the medicals are continuing to be gathered by the plaintiff's lawyer. The requirement that the action be dismissed at the 180 day mark by the Registrar has effectively made it so that in many cases, the actions are moved through the litigation process too quickly. This is further complicated, from a plaintiff's lawyer's point of view, by the 180 day service of the claim requirement. How can it be that the plaintiff has 180 days to serve the claim, but on the 181st day,

the claim will be dismissed? Effectively, the 180 day service requirement is more like 90 days because you need some time after serving the claim to have the claim reported to the insurer, an investigation to take place and a defence lawyer to be appointed and brought up to speed. Surely this cannot have been the intention of the drafters.

If the 180 day deadline is missed and the action is dismissed by the Registrar, often by no fault of the plaintiff's lawyer who might indeed have asked for the adjuster to hire a defence lawyer but that simply didn't happen, the plaintiff's lawyer has to bring a very unnecessary motion to set aside the dismissal and extend the time for the defendant to file a statement of defence. These motions always proceed on consent. If the 180 day deadline is approaching and the defendant has not entered a defence, plaintiff's counsel is often in the unhappy position of having to note the defence in default, even though negotiations are continuing. The defendant then has to incur the unnecessary expense of moving to set aside the default, and again, these motions always proceed on consent. The reason for the 180 day deadline I assume was to move cases along once they are issued. It is only necessary to force cases to move along once the defence lawyer is involved. This deadline should be abolished. To meet the concern of the court, which is presumably that once the parties want to litigate, their cases should move quickly, we have the mandatory mediation deadline, which quite appropriately runs from the date of the first defence filing. At the stage where a first defence is filed, the court is sure that the parties want to proceed through litigation because a defence lawyer has been hired. Up to that point, the court is wrong to assume that the plaintiff wants to litigate simply because a claim is issued. As it stands, the 180 day dismissal rule costs a lot of money and often requires the appointment of defence counsel where none is required".

While the purpose expressed in Rule 77.02 remains valid, increased flexibility ought also to be considered where the parties consent or co-operate rather than a concern that such co-operation be seen as some conspiracy to undermine the expeditious resolution of the case.

More issues management as opposed to scheduling management might also assist in the early resolution of cases.

Mandatory mediation while a separate rule, nonetheless sparks debate in the case management ring. The refrain often heard is that it is too early in the process. Many lawyers are serving Notices of Intent, not filing them and letting opposing counsel know that so the case expiry notice won't creep up on counsel. While this practice only leads to a delay of no more than 3-4 months, it recognizes the preference of counsel to delay, only marginally, the mandatory mediation. It does not strike at the purpose and object of case management.

This practice, in some cases, gives the lawyers the additional time required to assemble evidence or get the case through to discovery whereafter it is felt that a more constructive mediation might be held.

The MTLA encourages an increased flexibility in the timing of the mandatory mediation beyond that presently set out in Rule 24.1. Too early mediation often leads to a second private mediation when the case is more ripe for settlement and only adds to the costs to the litigants.

Some counsel have suggested that mandatory mediation on consent of the parties take place within 90 days of completion of discovery.

Many counsel have suggested that timetables ought to be open to amendment on consent. The MTLA while recognizing this degree of flexibility may be helpful, also recognizes that such freedom could be open to abuse. The MTLA

supports the notion that amendments to timetables require the court sanction through case conference.

Case conferences have proven to be extremely helpful and efficient especially when done via telephone. The majority of such conferences are done by telephone. However, the MTLA recommends that a case conference protocol be instituted since each master appears to have his or her own protocol and it is difficult for the bar to know which protocol applies.

For example, each time counsel wants to arrange a case conference, a call is placed to the master's registrar. The registrar tells counsel that specific master's preference in arranging the conference. Some masters require a letter copied to all parties, while others have specific case conference request forms, which if not used will either give rise to a denial of a case conference before that specific master or if a case conference is granted, a lecture about using forms!

More use of email and the web might also be helpful. It may also address the concerns expressed by too much paper generated in case management.

Another area of concern relates to motion dates. It is increasingly difficult to obtain timely dates which often compromise dates fixed in timetables. This again confronts a concern raised by the MTLA in its original submission to the Steering Committee, the issue of resources.

The MTLA expressed in May 1999, that case management would become known as "case mismanagement" if all it did was move cases more quickly to a backlogged trial list. While additional masters were added after 100% case

management was implemented, it has nonetheless lead to the concern expressed over four years ago. It now takes upwards of 2 years to obtain a trial date for cases beyond 10 days when appearing in Trial Scheduling Court. Cases are thus, in many instances, "rushed" through the case management system only to wait an inordinately long time to get to trial.

Trial dates ought to be set as part of the original timetabling done by the Master and thus each party would be aware from the outset, the trial date that the parties are working towards. Further, if masters are able to set trial dates, they should also be able to adjourn trial dates in the same manner as can judges – only for cogent reasons.

The MTLA supported the implementation and continues to support case management. Case management has essentially had its intended effect to move cases forward while allowing sufficient time for the conduct of the proceedings. While the last two years have demonstrated that case management is a "good thing", the observations and suggestions made by our members are not meant to overhaul the case management system but rather to make it an even "better thing."

Metropolitan Toronto Lawyers Association
September 2003

APPENDIX 4

CANADIAN
DEFENCE
LAWYERS

February 27, 2003

Ms. Carolyn Horkins
Gowling Lafleur Henderson LLP
Barristers and Solicitors
Scotia Plaza
5800 - 40 King Street West
TORONTO ON M5H 3Z7

Dear Ms. Horkins

Re: Case Management Implementation Review Committee - Toronto

If we begin with the principle that all actions need not be Case Managed, a second question arises - **which ones do?**

Cases that Require Case Management

Multiparty Litigation
Multiparty litigation is best served by Case Management. That is to say where there are four counsel or more involved in the action. This is largely because it is difficult for four or more counsel to coordinate scheduling to the satisfaction of all. It is therefore recommended that a Case Management Master may be able to *push the priorities* which would greatly assist in advancing the litigation.

Cases in which the Parties Do Not Advance the Action Themselves
Cases which have not been promptly moved forward by the parties themselves benefit from case management. It is suggested, however, that the parties be given an opportunity to advance the action themselves without intervention by the court before the court steps in to advance the action for them.

Well before case management, rule 48.14 (status notices) sought to remedy the problem of cases languishing without resolution. The court would automatically issue a status notice

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in every case that had not been set down for trial within two years of the date of the first defence. Beginning in the late 1980's, rule 48.14 began to be ignored to the point where now, throughout the province, status notices are only issued on requisition. The remedy provided in rule 48.14(4), a dismissal by the registrar if no action was taken within 90 days, was considered too drastic, and the status hearings were considered unproductive.

It is suggested that the concept of the status notice be revised and renewed with the remedy for delay being case management. If the plaintiff has not certified within 8 months of the first defence that the plaintiff's discoveries are complete, the case would be immediately put in case management as follows: a case management conference would be immediately convened or arranged by the court; and (2) the case management master would be required to set a relatively stringent timeline for the continued handling of the case.

Similarly, if the plaintiff has not listed the action for trial within one year of the first defence, the matter would go into case management in the manner suggested above.

Finally, if no defence has been filed within 6 months of the claim being issued, the matter would also go to case management in the same manner.

Mandatory Mediation

While mandatory mediation may be a helpful process, it should be noted that motor vehicle accident cases can be mediated pursuant to the provisions of the *Insurance Act* by way of request of any party be it an insurer or claimant. The same is not true of other kinds of cases. Also, often mediations are held far too early and discovery is really necessary before the parties are in a position to mediate. It is therefore recommended that the rules in respect of mandatory mediation be altered. A number of Canadian Defence Lawyers have commented that the mediations become an entire waste of time in advance of discovery and that they are simply "... going through the motions ...". In order to avoid such an expense, the process for of mandatory mediation should be amended.

It is suggested that the timing of mandatory mediation be dependent upon the type of case so that in personal injury cases mediation is not mandatory until after discoveries. The plaintiff would be obligated to identify at the time of issuing a claim whether the claim is primarily for compensation for personal injury against an alleged tortfeasor. Defence counsel would have the option of objecting to plaintiff's counsel's characterization of the case. If defence counsel did object to the characterization of the case, a hearing before a master could be convened by the court. The only required material for the hearing being the statement of claim and, if filed prior to the hearing, the statements of defence. The intention would be that motor vehicle tort claims and occupiers liability cases and the like

be mediated after discoveries. Accident benefits claims, LTD claims, claims for defamation or wrongful dismissal be subject to immediate mandatory mediation.

If the parties agreed or the master determined that the action is primarily for compensation for personal injury against an alleged tortfeasor, mediation may be delayed by the parties. If not, mediation would be mandatory in the manner currently mandated by rule 24.1. If it is a case where mediation can be delayed, the intention is that the parties would arrange mediation to take place immediately after discoveries. The parties would be obliged to certify to the court within 8 months of the filing of the first defence that a mediation had taken place. If the parties did not do so, then the mediation co-ordinator would send out the mandatory mediation notice at that point and/or the matter would go into case management.

Yours very truly,

D. Kevin Carroll, Q.C.
President
DKC/brs
e-mail: dkcarroll@chcbarristers.com

Case Management Implementation Review Committee

Statistical Analysis Report

APPENDIX 5

January 2004

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January 2004

Exclusions

Unless otherwise specified, each of the following have been excluded from the statistics.

- cases not in the Civil division
- any case that has "TT" (temporary transfer) anywhere in the file number
- any case where the prefix (e.g. 97-**LT**-123456) is one of the following
  - LT (Landlord & Tenant)
  - OR (Bankruptcy)
  - BK (old Bankruptcy number format)
  - CL (Commercial List)
  - OT (out-of-town)
  - CT (case transfer)
- cases where the Case Filing Type has been entered as "Originating Proceeding Out-of-Town"
- cases with any one of the following Case Types:

CVB	Civil - Bankruptcy	CVCL	Civil - Construction Lien	CVPBA	Civil - CL-Pension Benefits Act
CVBA	Civil - CL-Bank Act	CVCLT	Civil - Civil Claim - L/T	CVPPS	Civil - CL-Personal Prop. Sec. Act
CVBK	Civil - BK-Bankruptcy	CVCO	Civil - CL-Other	CVRA	Civil - CL-Rec. Act (Insol. App.)
CVBKA	Civil - CL-Bankruptcy Act	CVCOM	Civil - Commercial	CVRES	Civil - Restitution Order
CVBS	Civil - Bulk Sales	CVLPA	Civil - CL-Limited Partnerships	CVSA	Civil - Sol. & Client Assessment
CVCA	Civil - Class Act	CVLT	Civil - Landlord/Tenant	CVSCA	Civil - CL-Securities Act
CVCBCA	Civil - CL-Canadian Bus. Corp. Act	CVOBCA	Civil - CL-Ontario Bus. Corp. Act	CVWUA	Civil - CL-Winding-Up Act
CVCCA	Civil - CL-Comp. Credit Arr. Act	CVPA	Civil - Party & Party Assessment		

Glossary of Terms

Events Heard

In order for an Event to be considered heard, all of the following conditions must be true:

- a result has been entered
- the result may not be "Withdrawn/Cancelled"
- if an adjournment result has been entered, the adjournment date may not be prior to the date of the Event

Events Not Heard

An event that does not meet the "heard" criteria. Also could be described as an event that was scheduled, but did not actually take place.

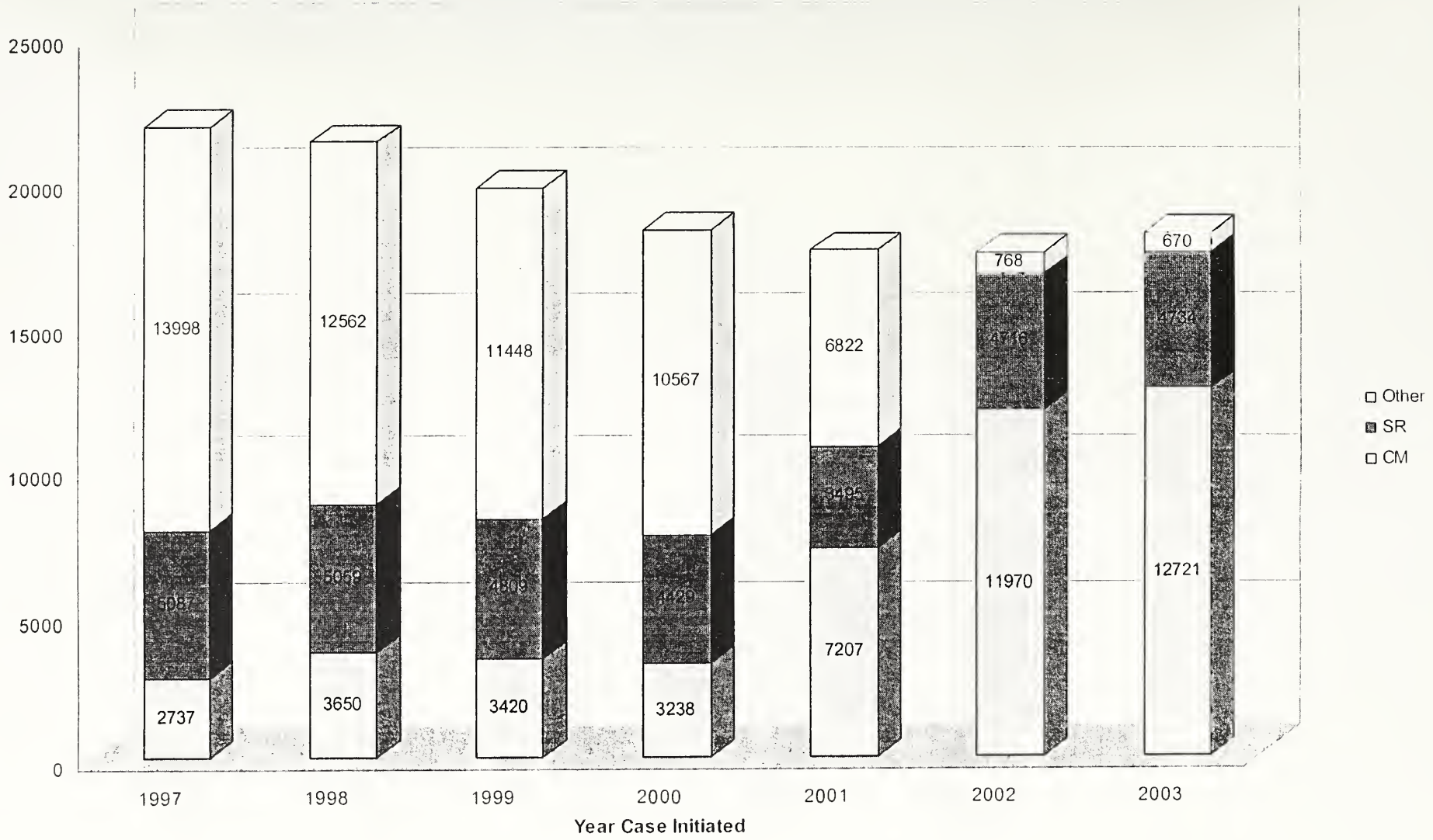
Events on Out-of-Town Proceedings

If the Case Filing Type is "Originating Proceeding Out-of-Town" or the case number contains "CT" then the case on which the event had been scheduled is considered out-of-town.

Milestones

February 1997	- change from 10% to 25% Civil Case Management
January 1999	- introduction of Mandatory Mediation
December 1999	- change to the Traditional Masters' motions booking procedure
July 2001	- change from 25% to 100% Civil Case Management
January 2002	- change in jurisdiction for Simplified Rules
September 2002	- change to the scheduling practice for Civil non-Case Management Judges' motions to mirror the practice under Case Management - change to the scheduling practice for all Civil special motions

1. Civil Cases Initiated



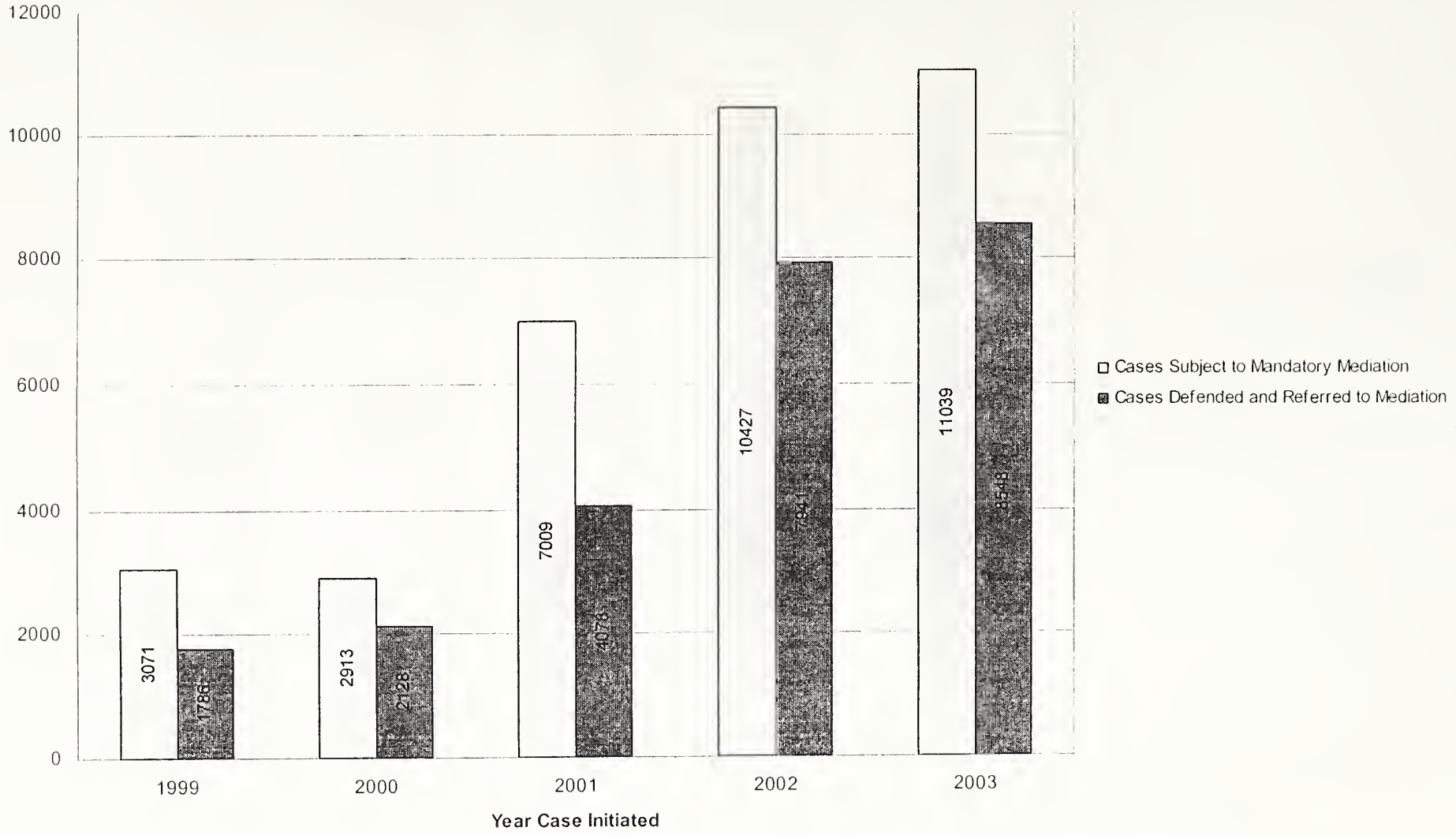
AIXXX

2. Cases Defended as a Percentage of Cases Initiated

XXXV

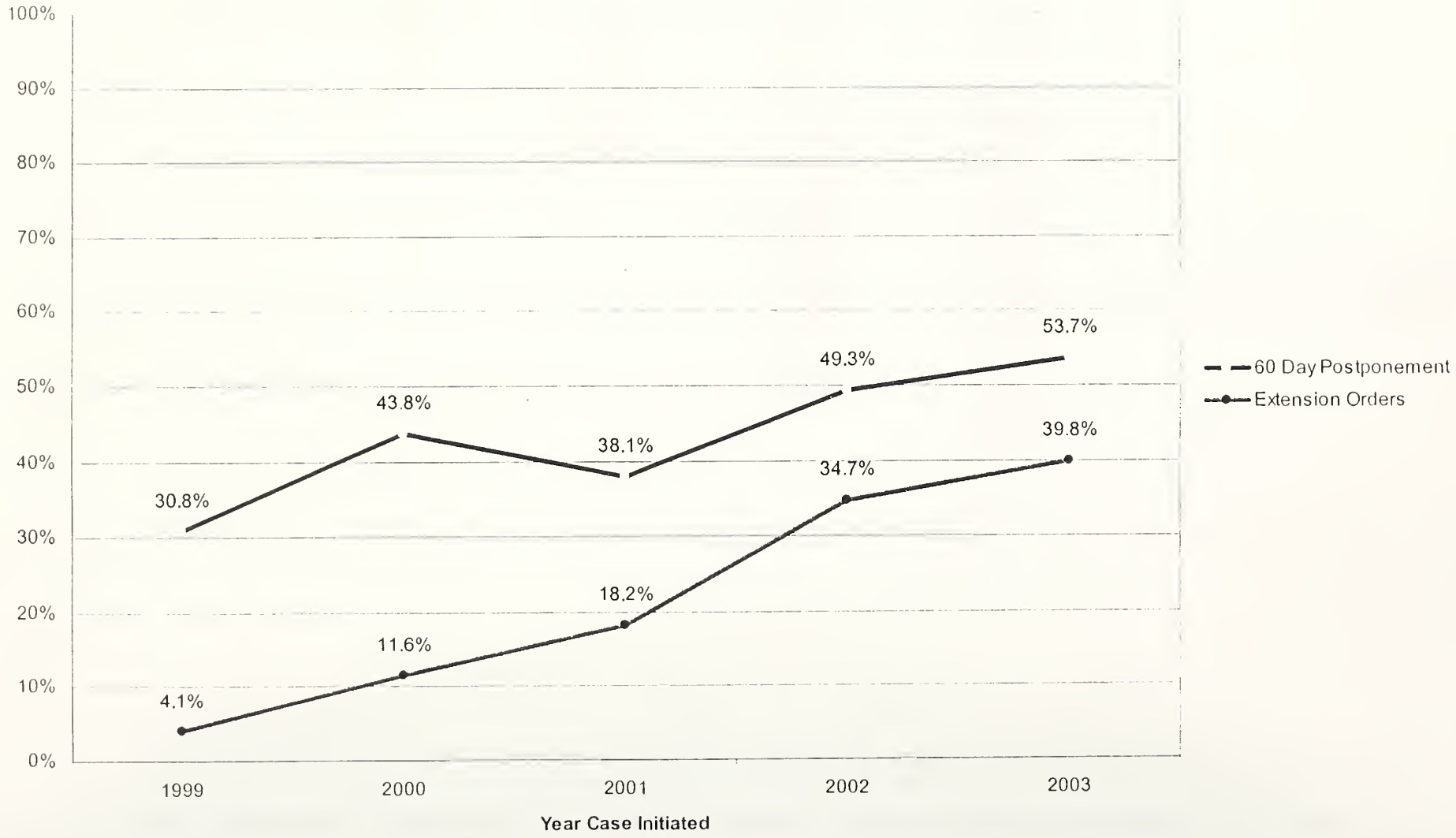
3a. Mandatory Mediation – Cases Subject To/Defended and Referred To

Note: Mandatory Mediation statistics are derived from the Toronto Mandatory Mediation Monthly Activity Report prepared by Corporate Planning Branch.



3b. Mandatory Mediation – 60 Day Postponements/Extension Orders

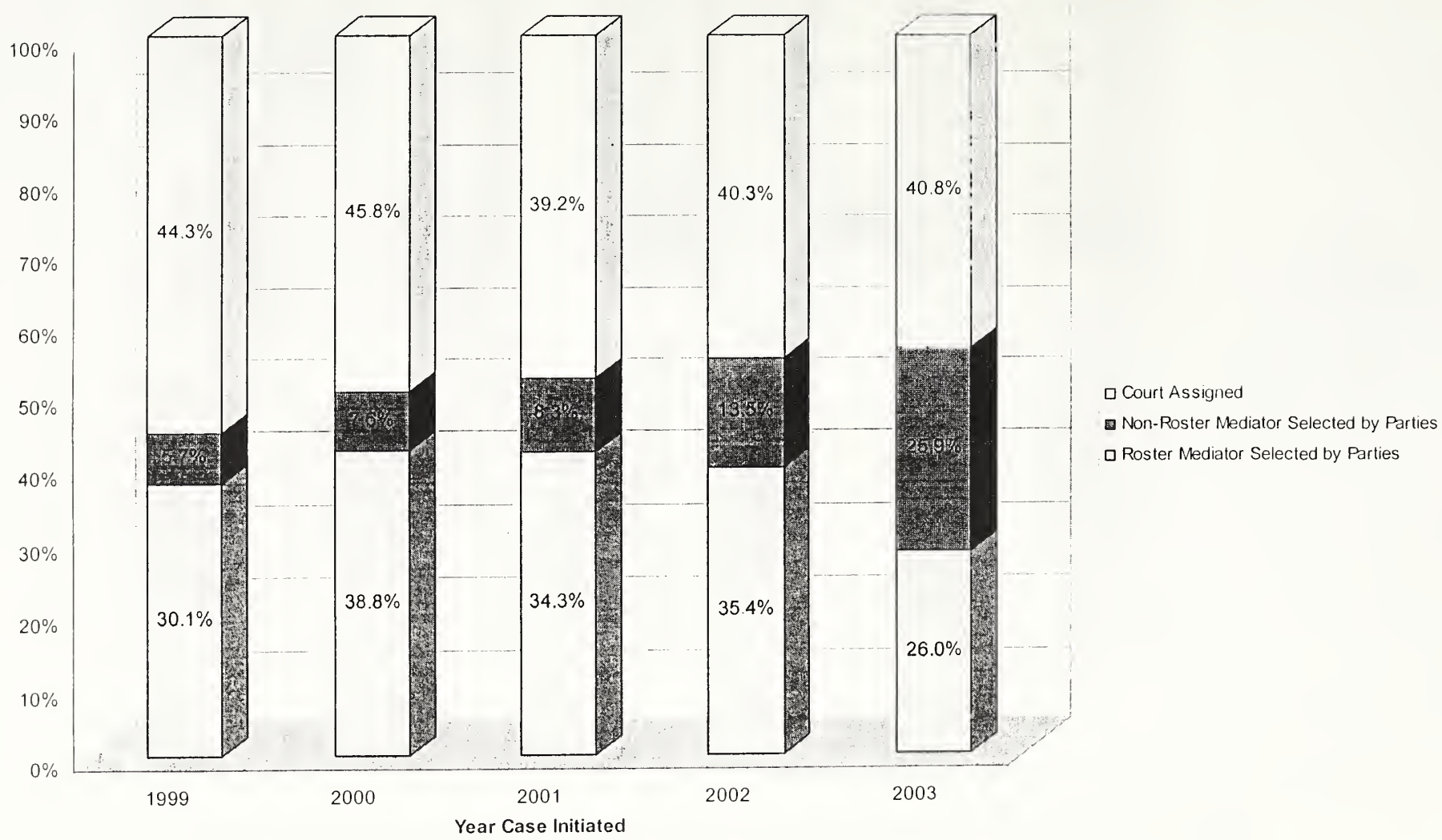
Note: Mandatory Mediation statistics are derived from the Toronto Mandatory Mediation Monthly Activity Report prepared by Corporate Planning Branch.



As a percentage of cases defended and referred.

3c. Mandatory Mediation – Mediator Selection

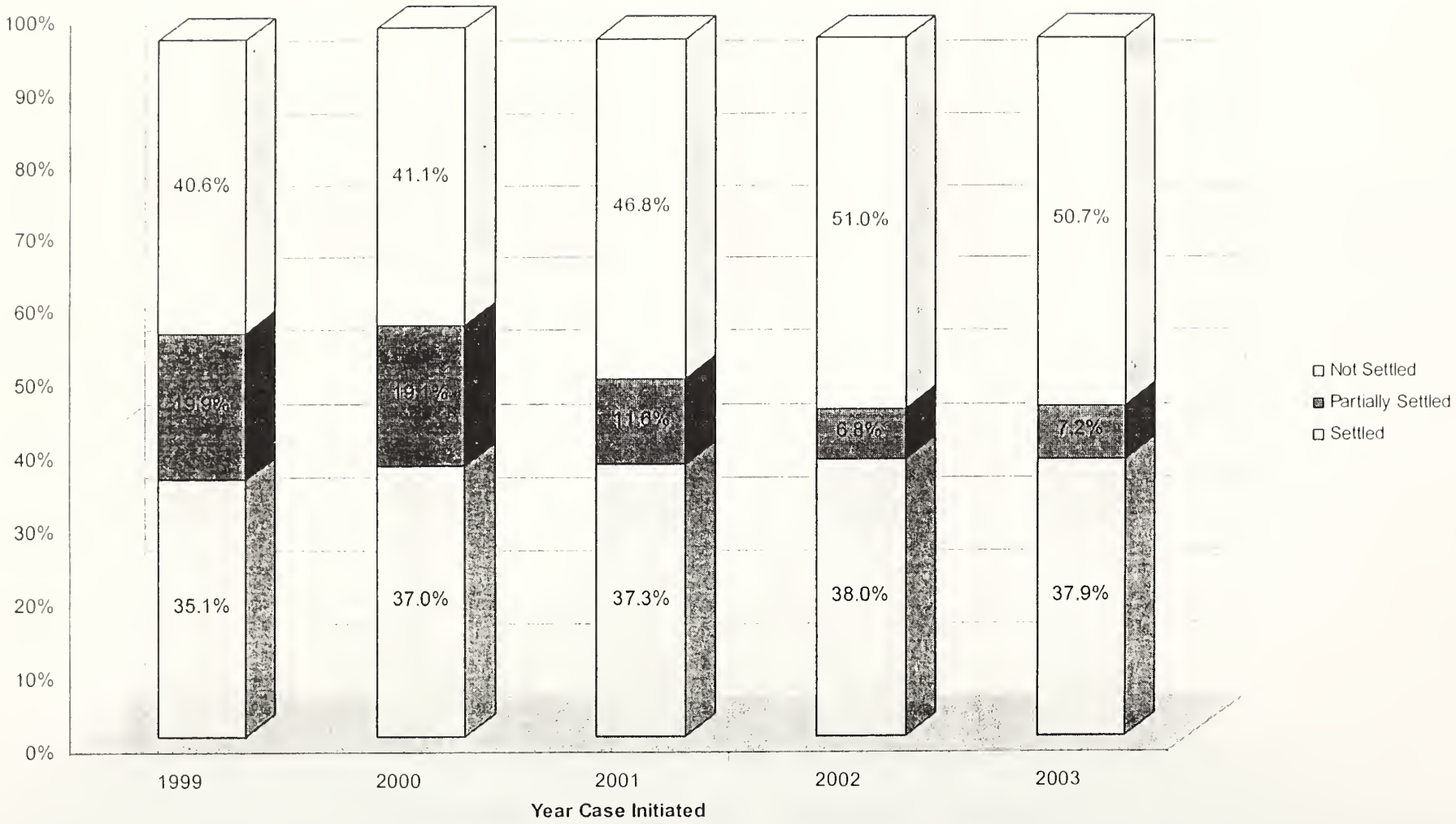
Note: Mandatory Mediation statistics are derived from the Toronto Mandatory Mediation Monthly Activity Report prepared by Corporate Planning Branch.



As a percentage of cases defended and referred.

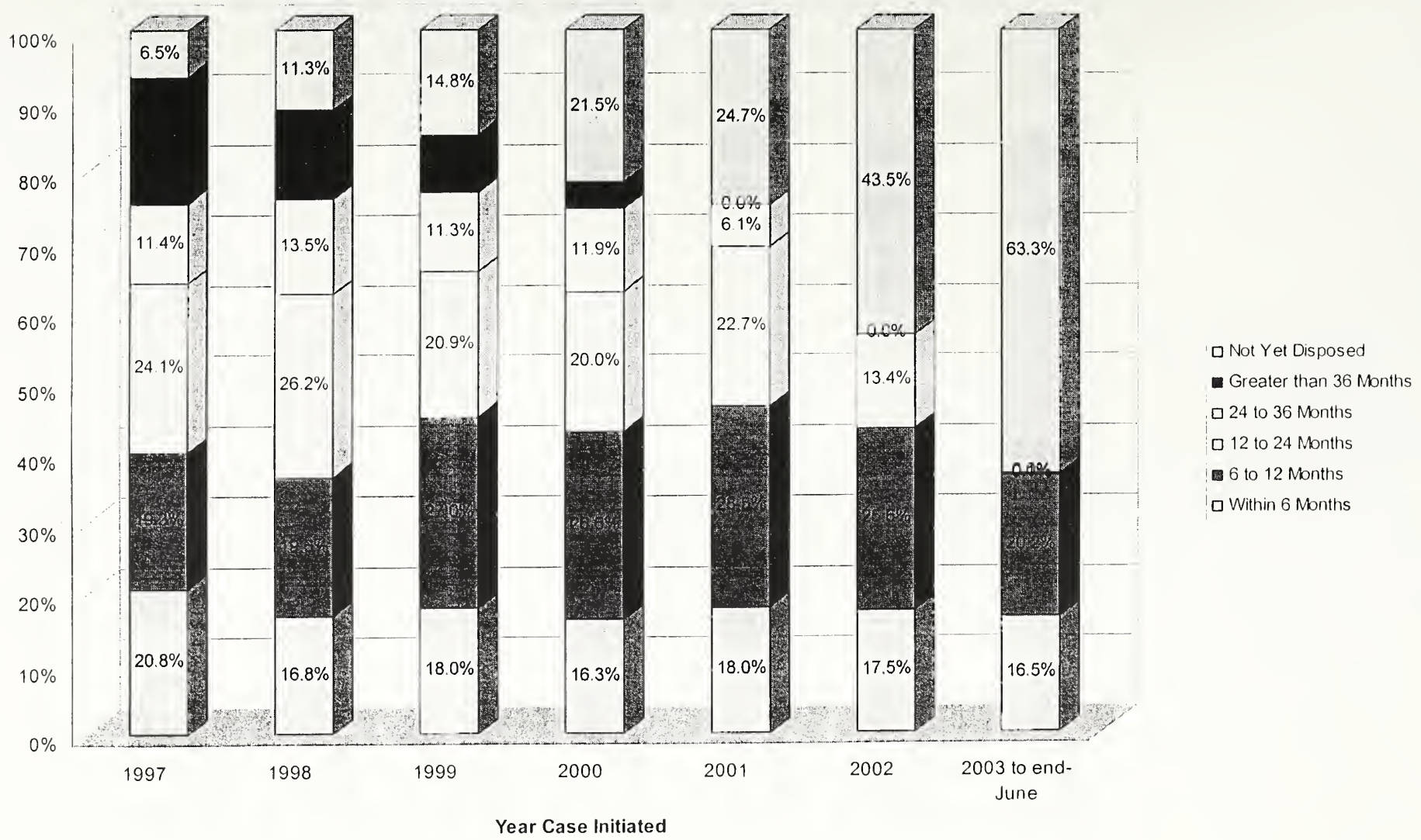
3d. Mandatory Mediation – Mediation Results on Mediations Held

Note: Mandatory Mediation statistics are derived from the Toronto Mandatory Mediation Monthly Activity Report prepared by Corporate Planning Branch.

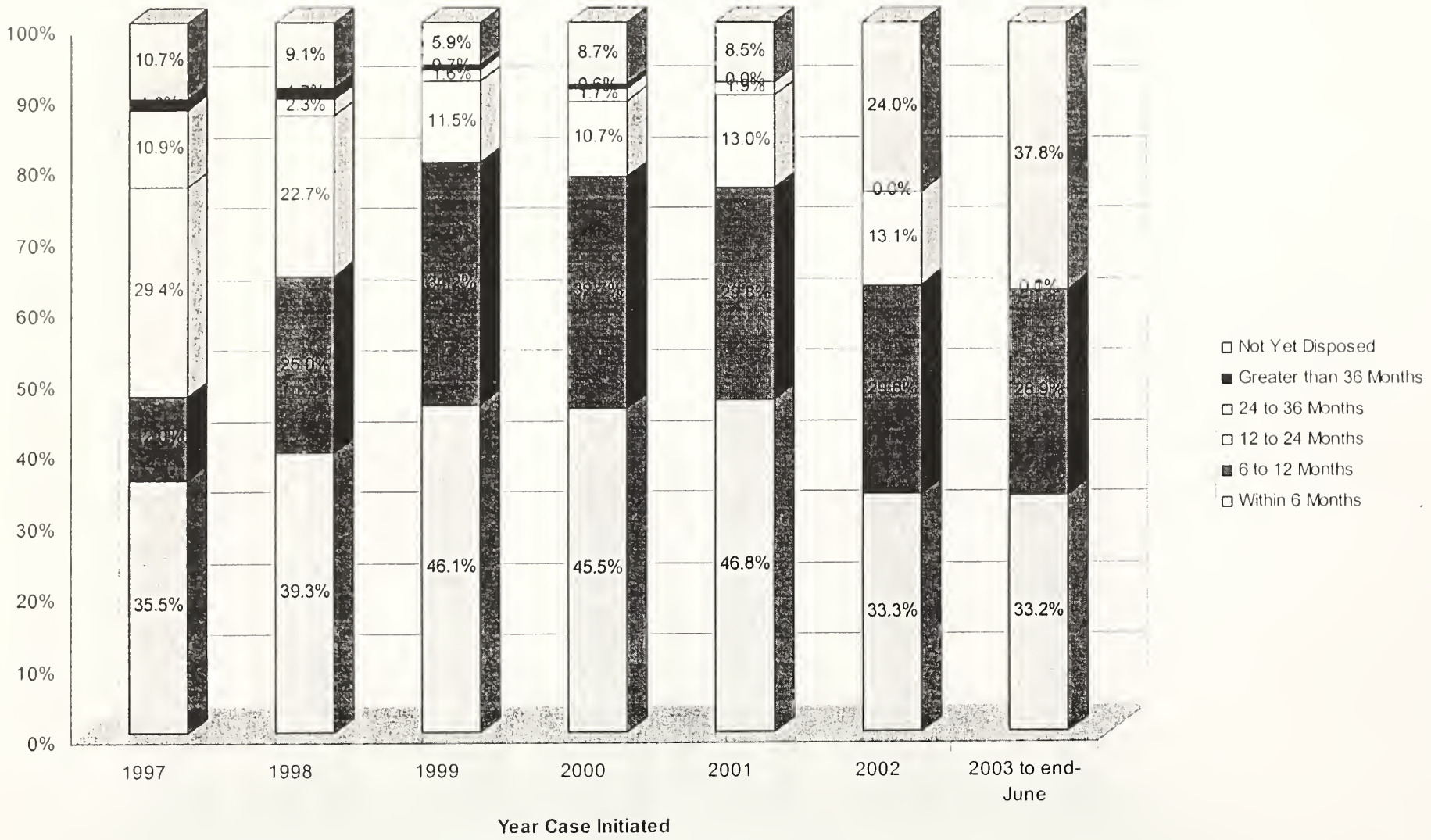


As a percentage of total mediations held.

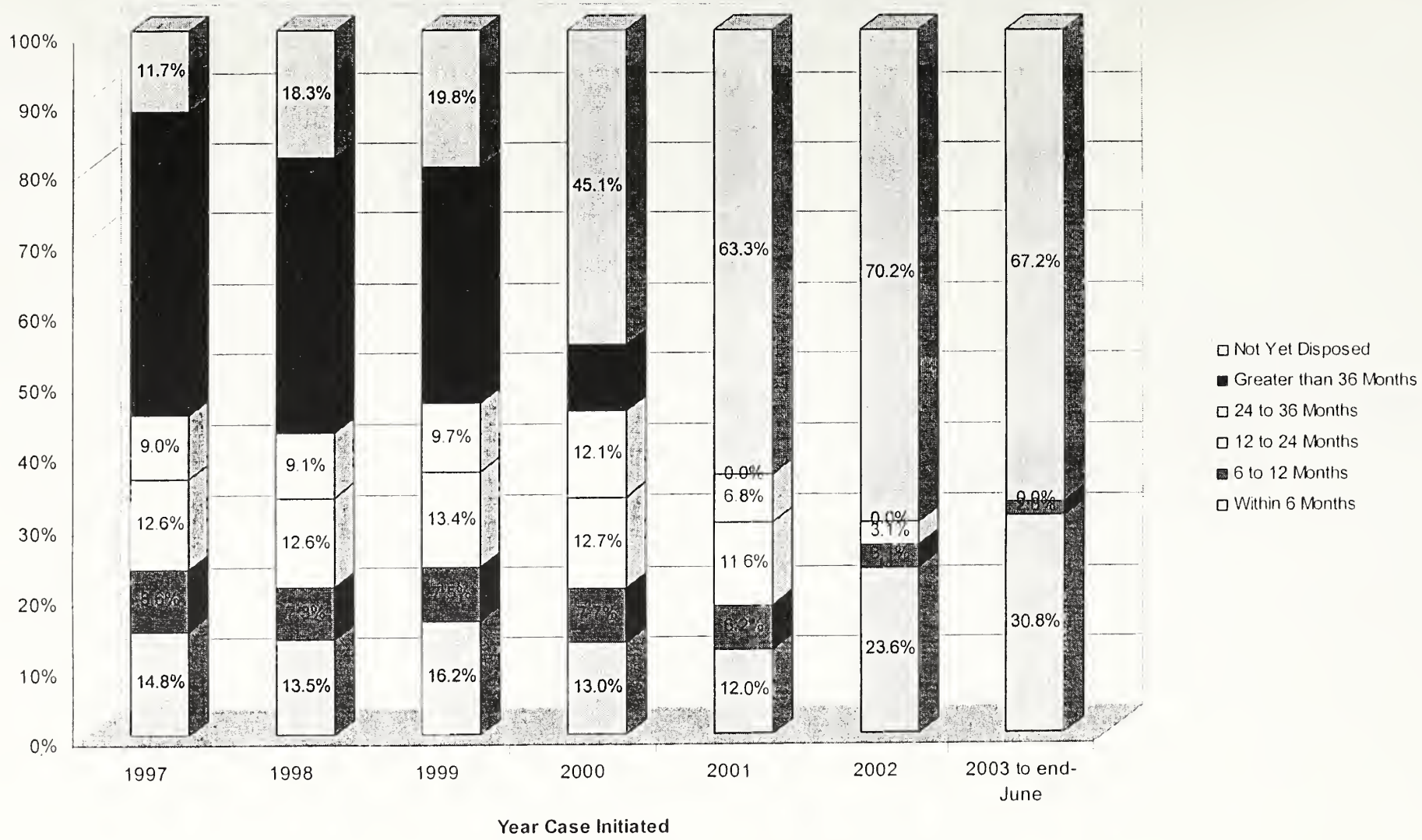
4a. Disposition Aging – Case Management



4b. Disposition Aging – Simplified Rules

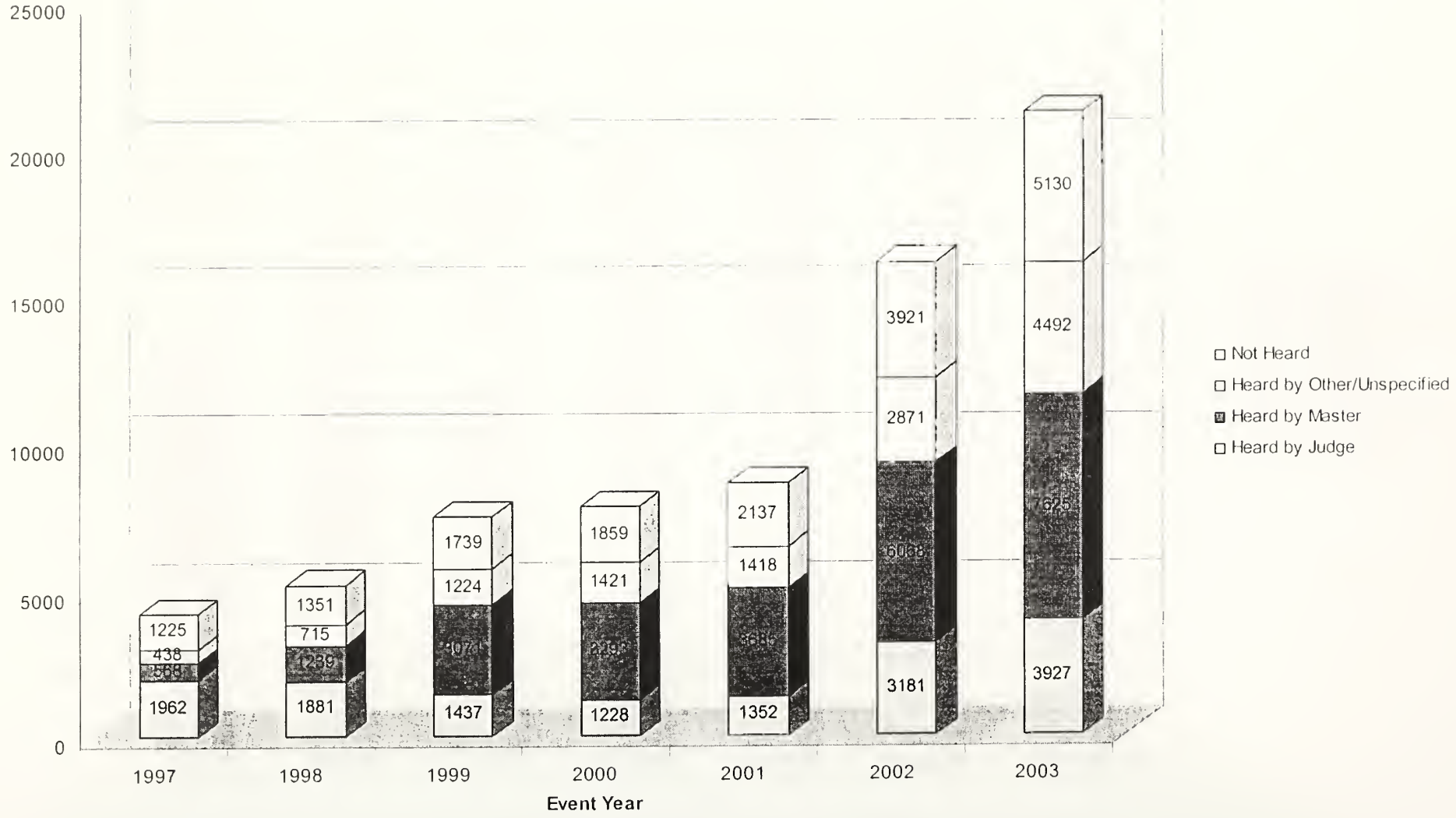


4c. Disposition Aging – Other



5a. Motions – Case Management

Note: The scale for each of the Motions graphs is different.

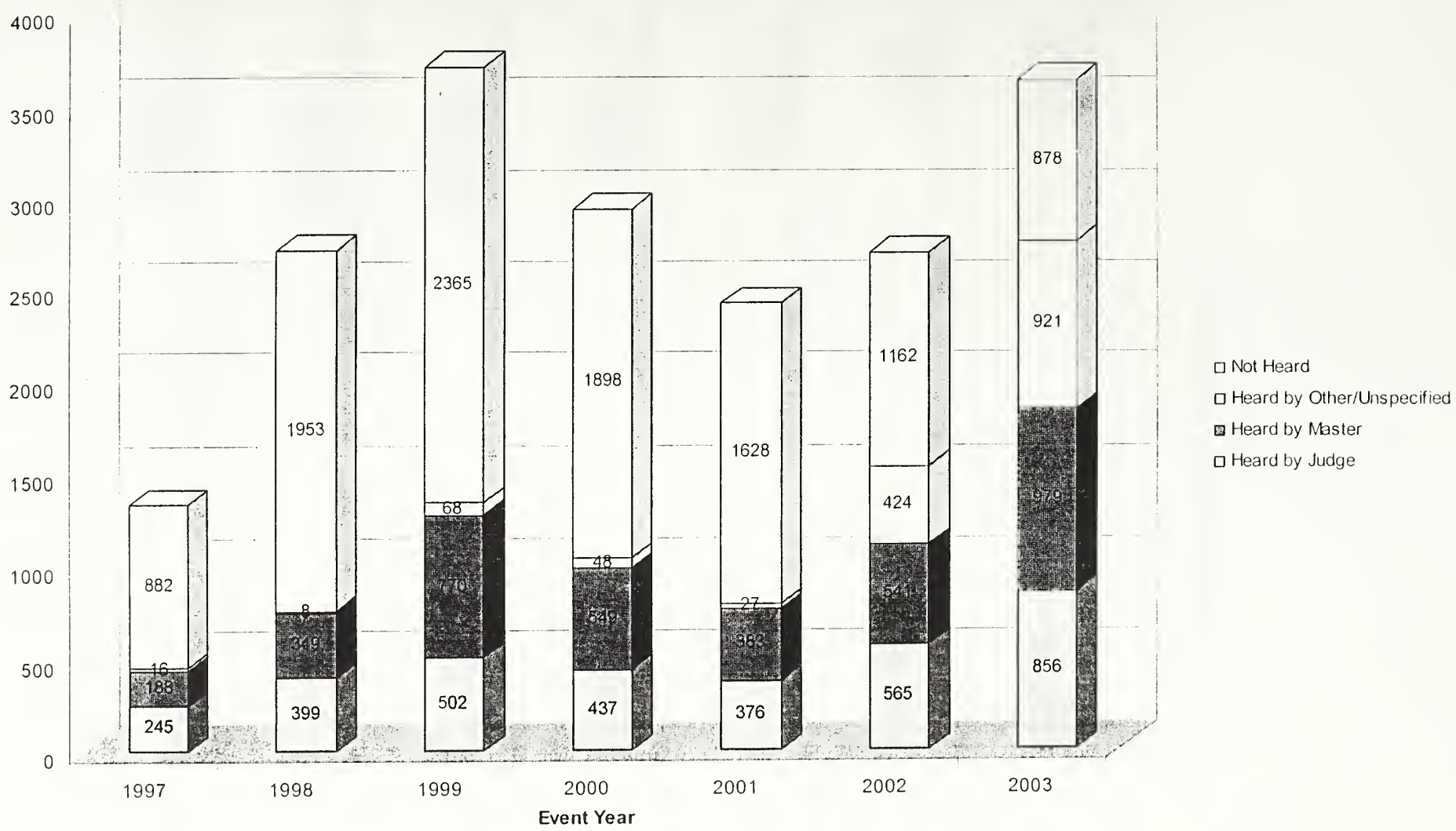


xliii

Includes out-of-town proceedings.

5b. Motions – Simplified Rules

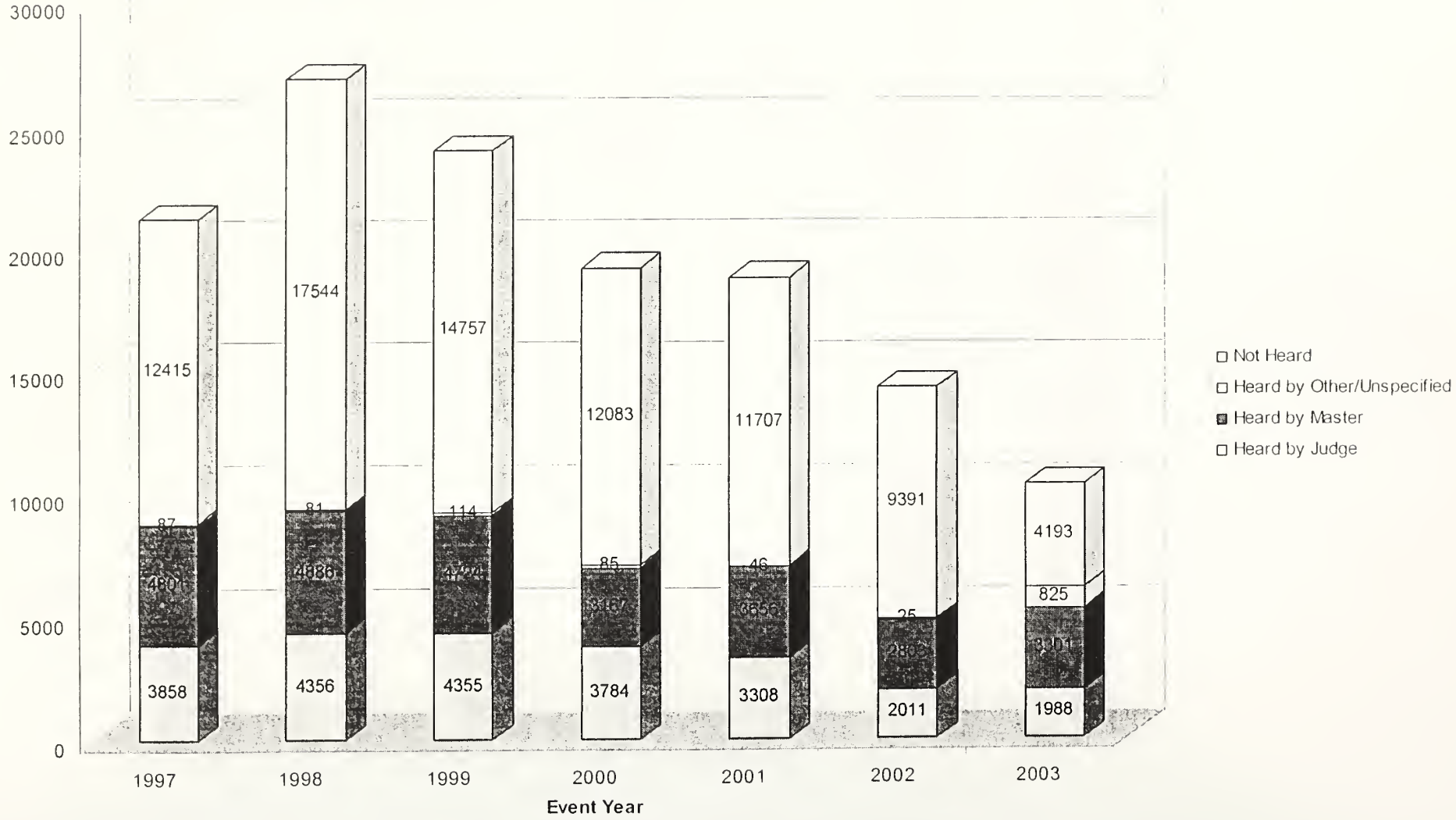
Note: The scale for each of the Motions graphs is different.



Includes out-of-town proceedings.

5c. Motions – Other

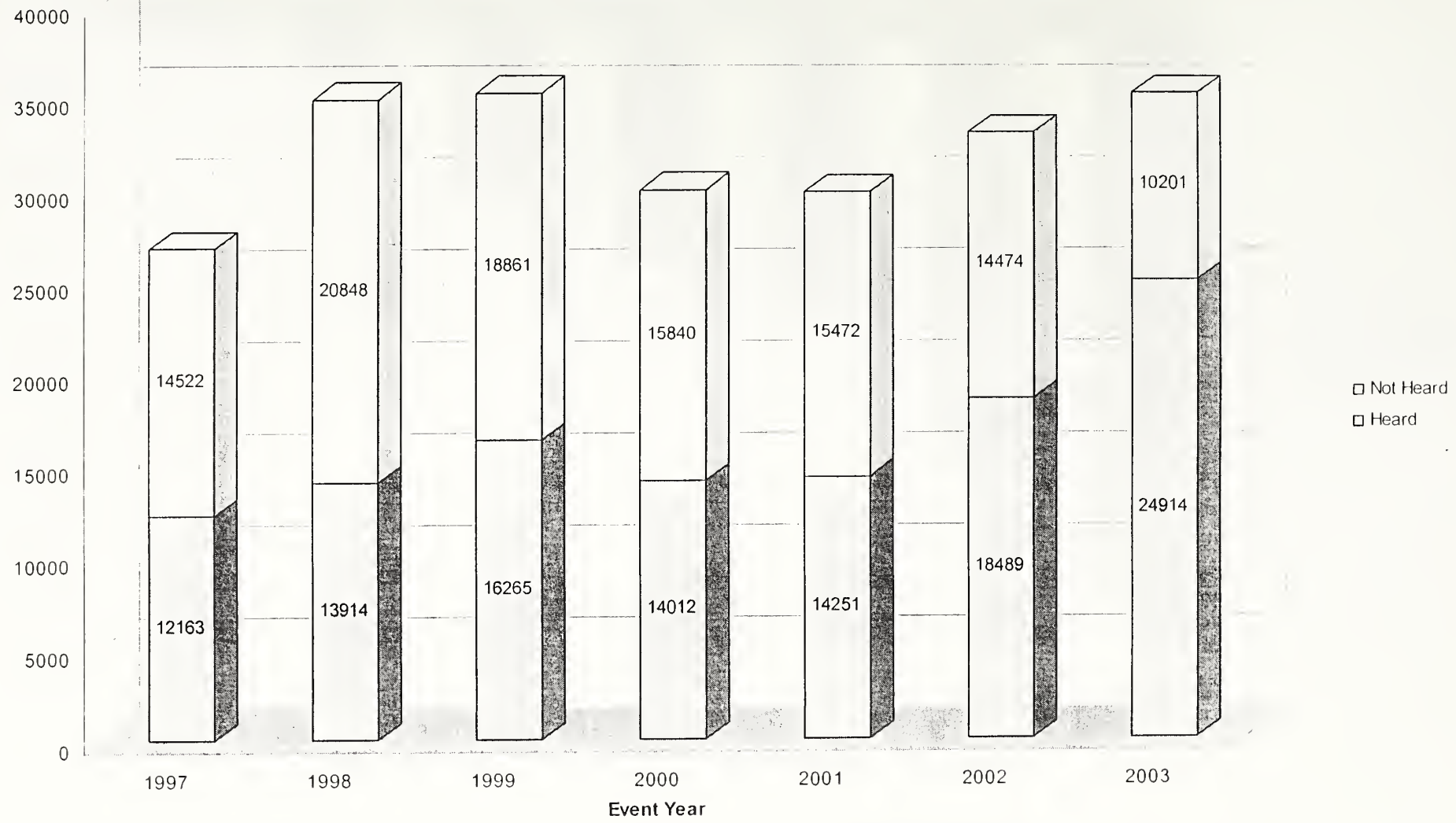
Note: The scale for each of the Motions graphs is different.



Includes out-of-town proceedings.

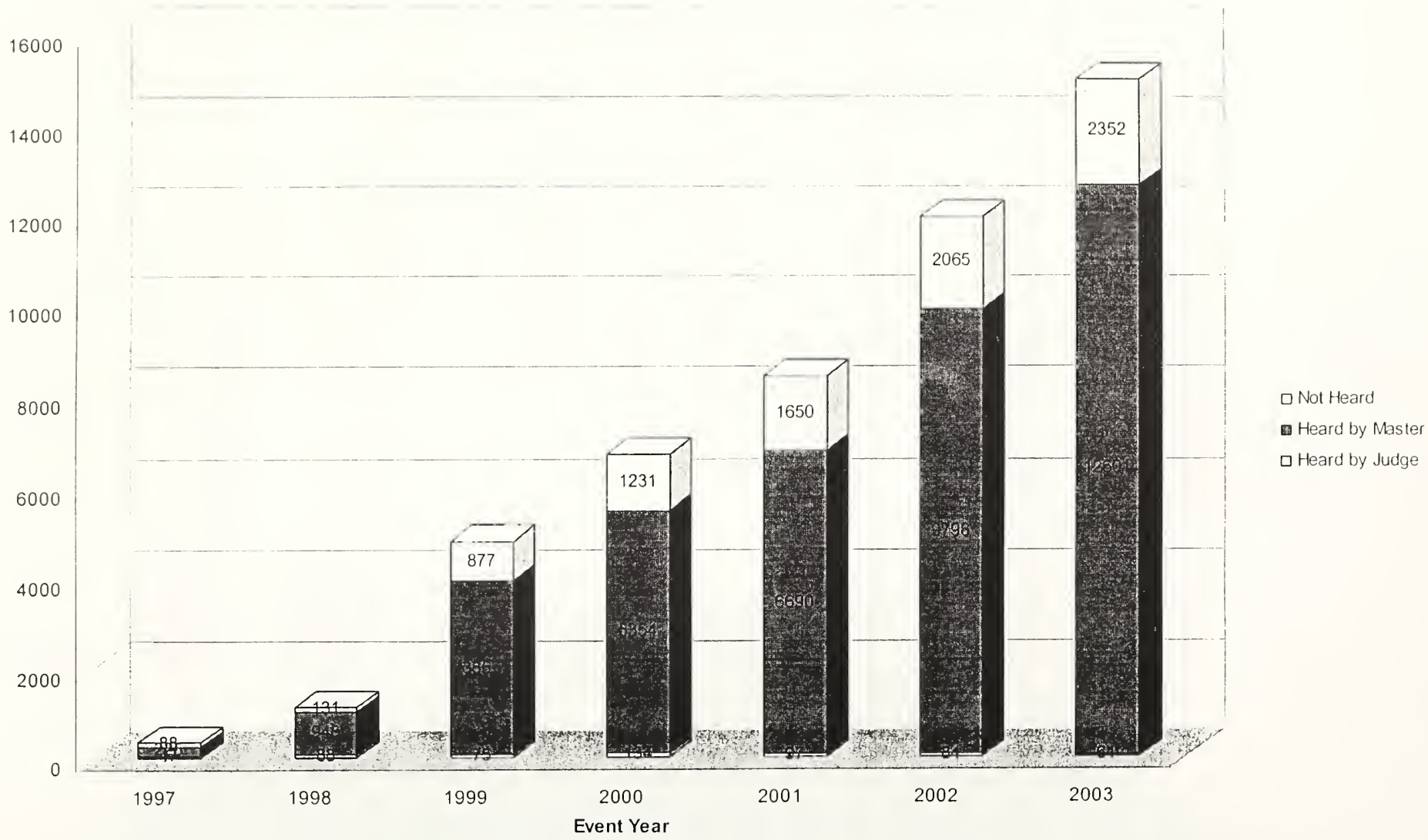
5d. Motions – Overall

Note: The scale for each of the Motions graphs is different.



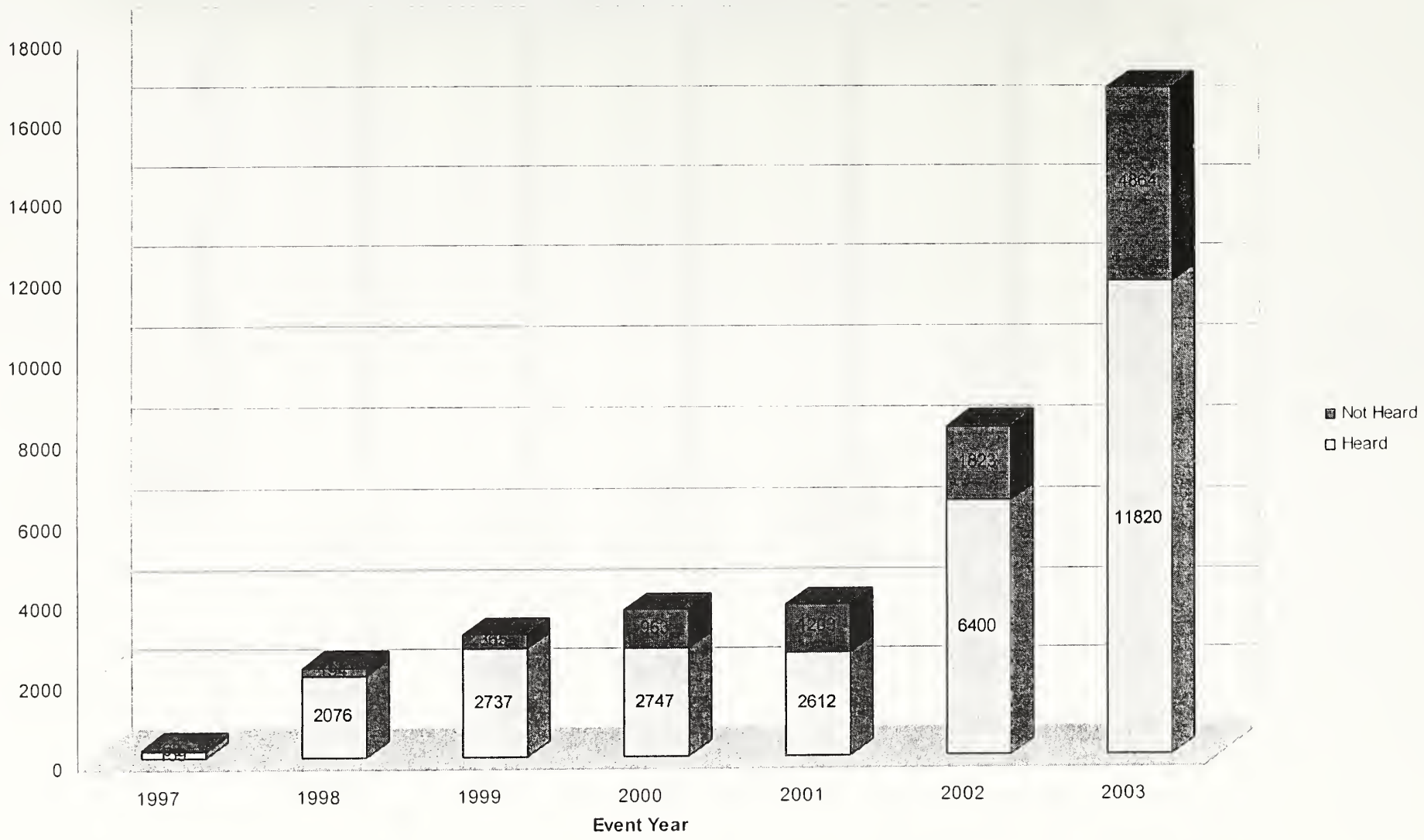
Includes out-of-town proceedings.

6. Case Conferences – Case Management



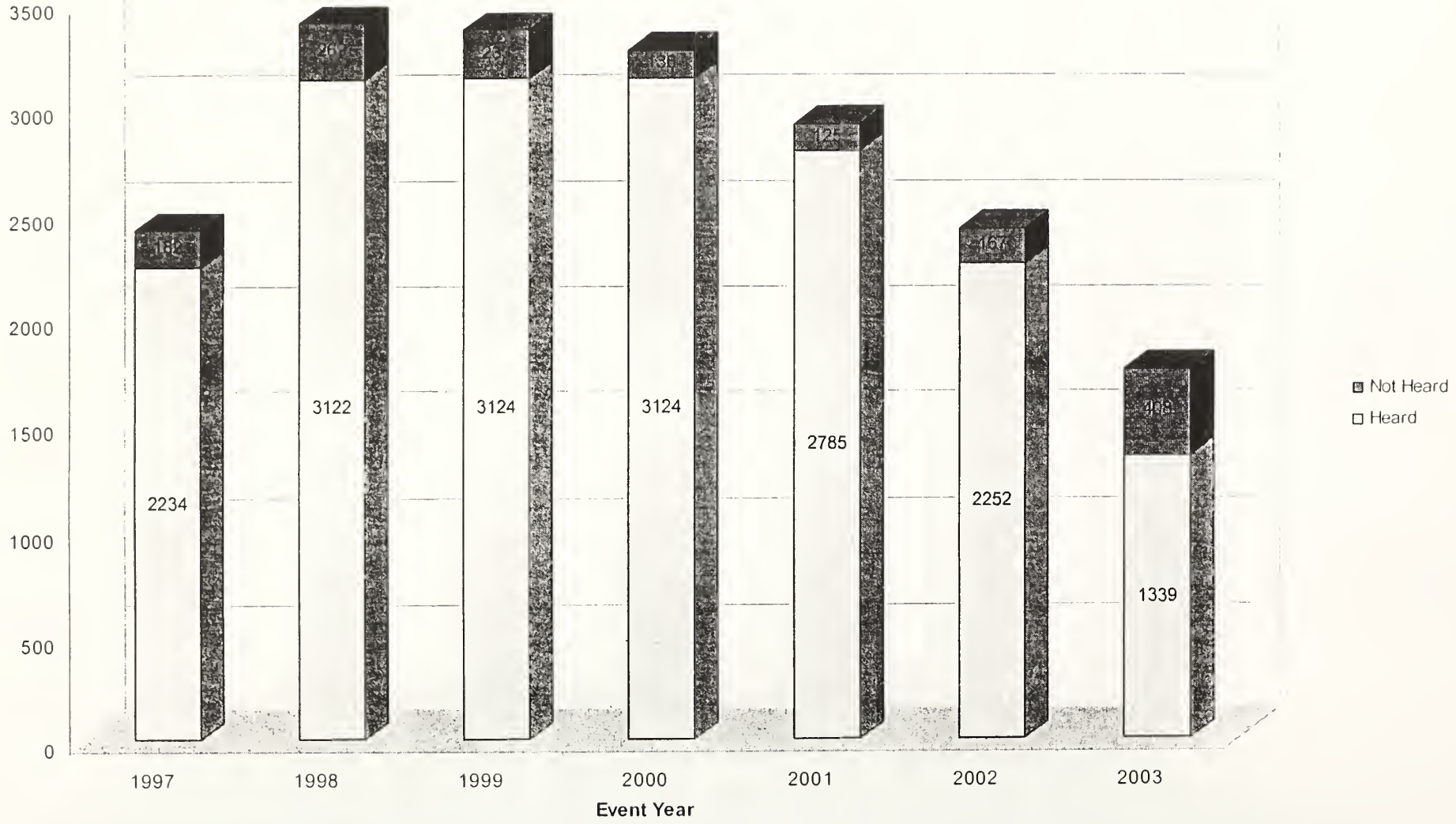
8a. Trial Scheduling Court – Case Management

Note: The scale for each of the Trial Scheduling Court graphs is different.



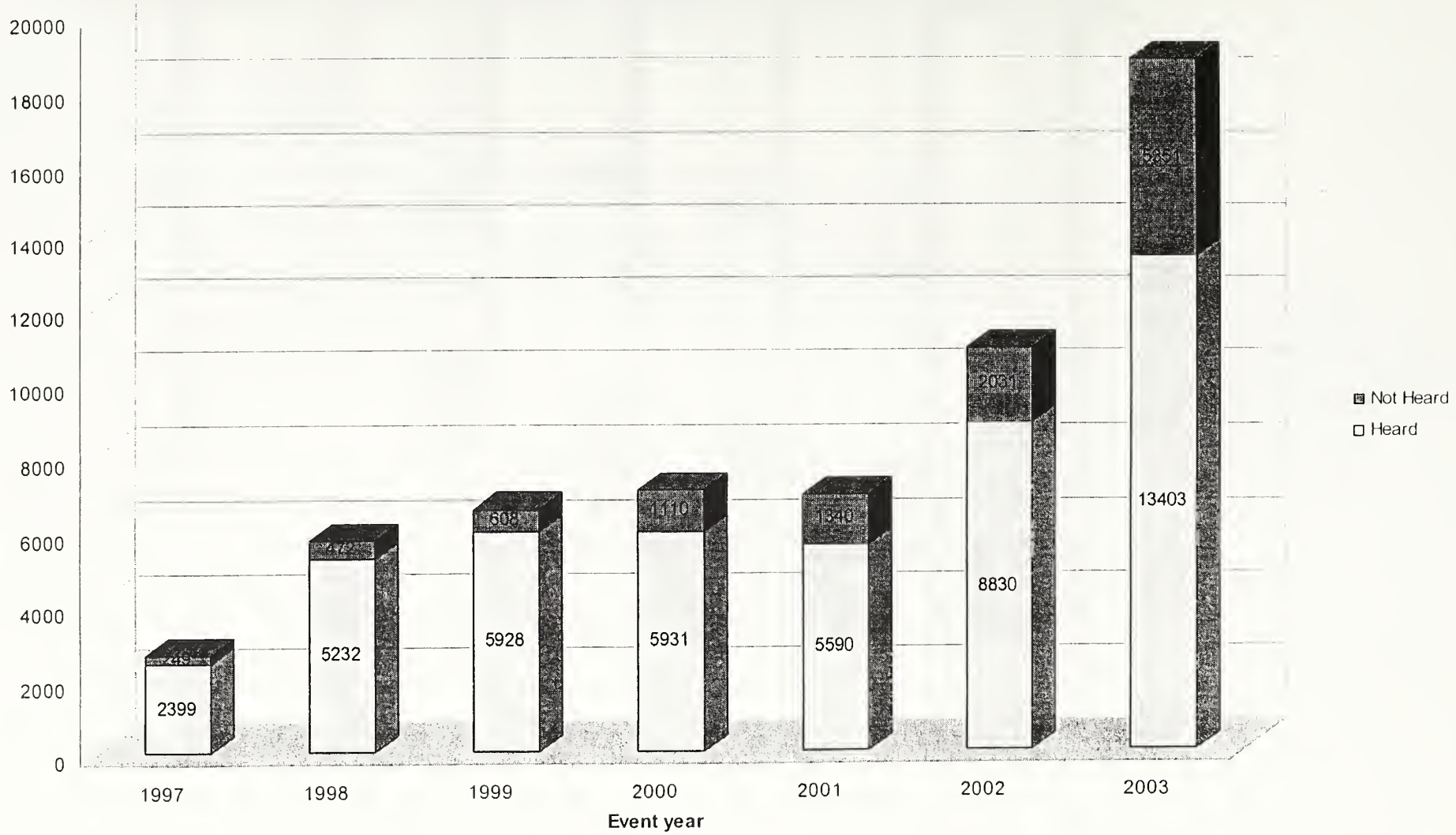
8b. Trial Scheduling Court – Other

Note: The scale for each of the Trial Scheduling Court graphs is different.



8c. Trial Scheduling Court – Overall

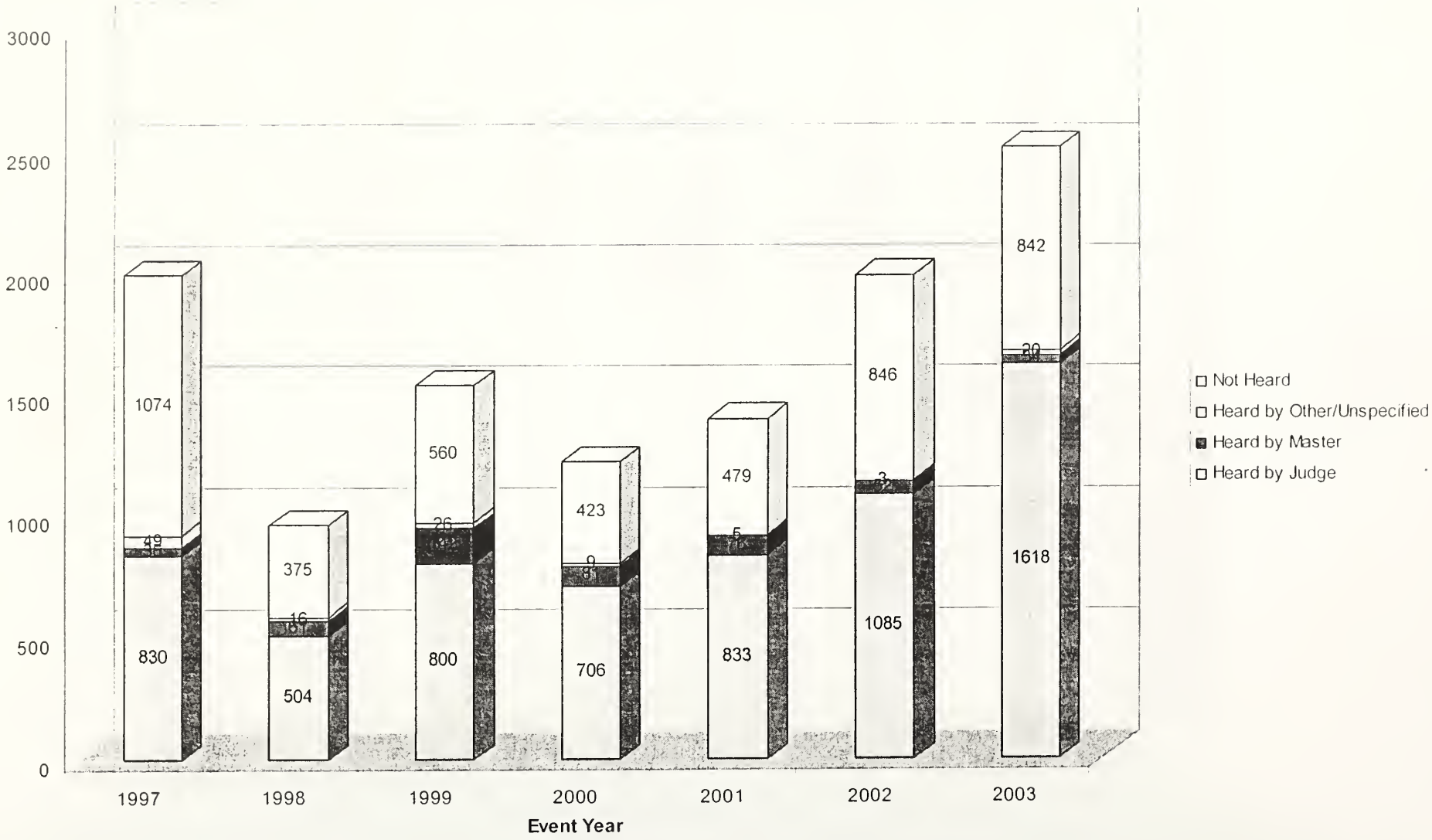
Note: The scale for each of the Trial Scheduling Court graphs is different.



Includes Simplified Rules.

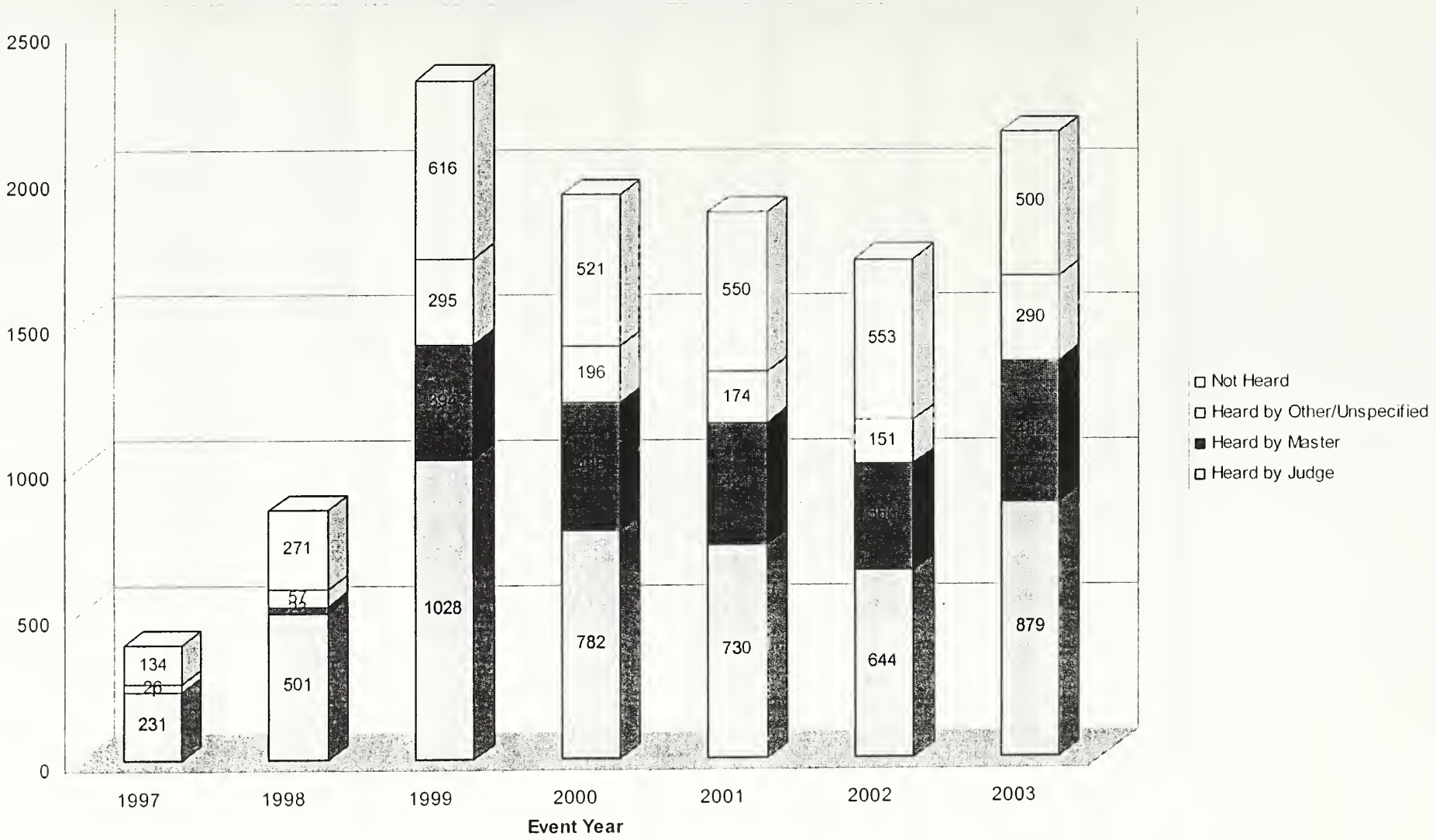
9a. Settlement Conferences or Pre-Trials – Case Management

Note: The scale for each of the Settlement Conference/Pre-Trial graphs is different.



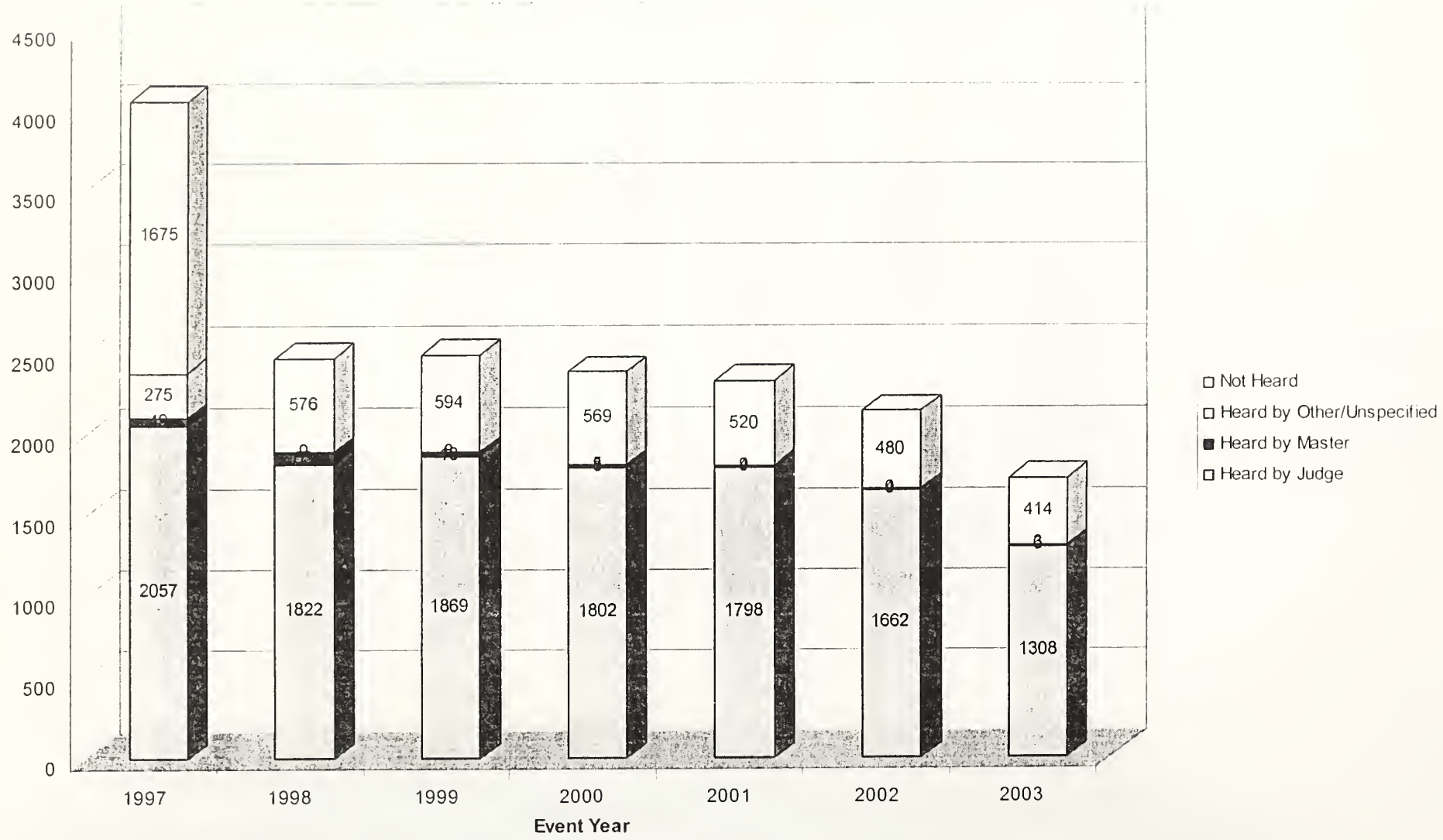
9b. Settlement Conferences or Pre-Trials – Simplified Rules

Note: The scale for each of the Settlement Conference/Pre-Trial graphs is different.



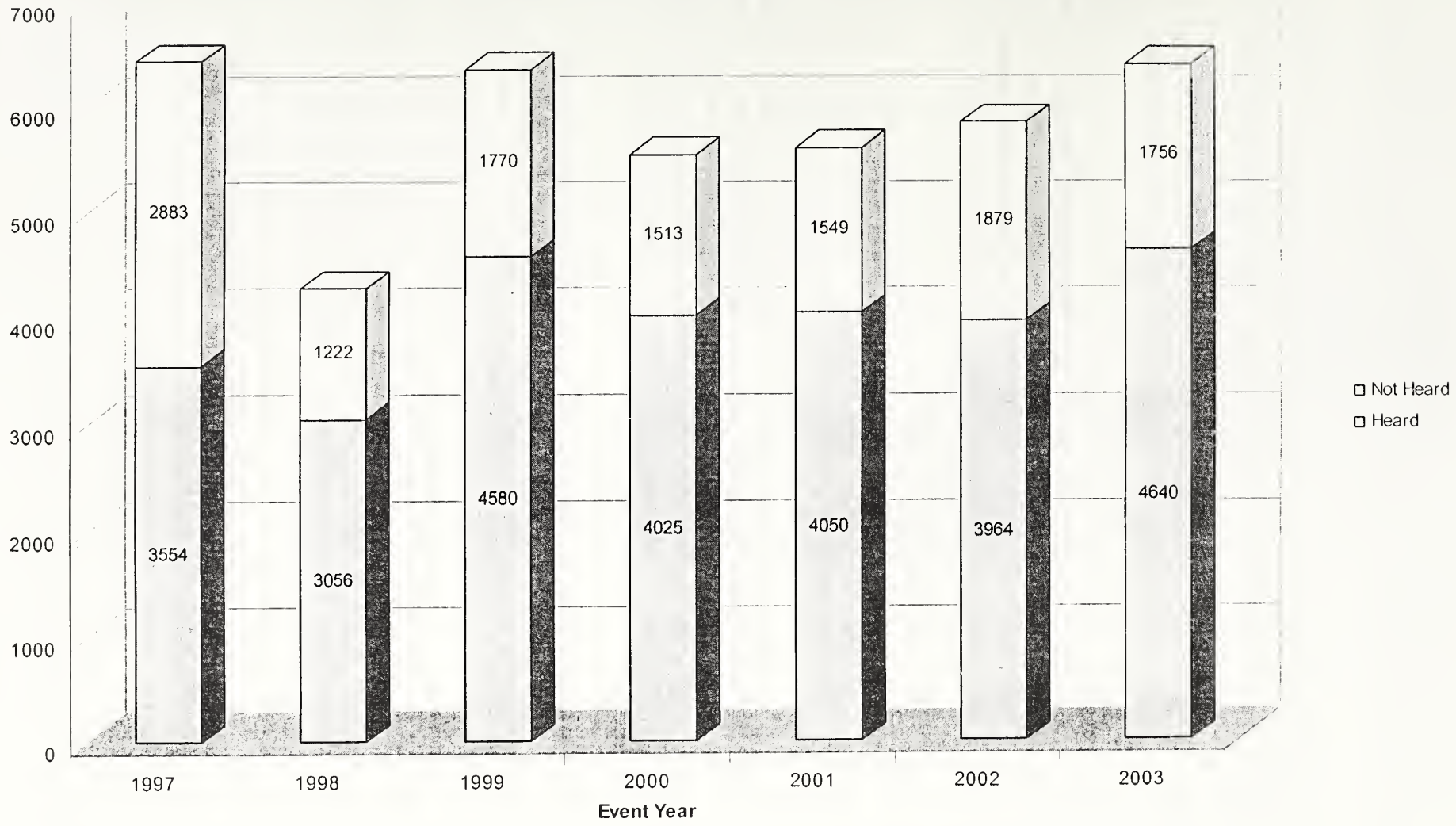
9c. Settlement Conferences or Pre-Trials - Other

Note: The scale for each of the Settlement Conference/Pre-Trial graphs is different.



9d. Settlement Conferences or Pre-Trials - Overall

Note: The scale for each of the Settlement Conference/Pre-Trial graphs is different.



APPENDIX 6

Toronto Administration – About Us

The Case Management Unit provides administrative and support services to the judiciary and other participants in the Superior Court. The unit is comprised of several departments:

Civil Intake

The Civil Intake Unit issues all actions and applications at the civil intake counters, together with the filing all pleadings and motions material, in actions governed by Rule 77 Case Management, Rule 76 Simplified procedures and the ordinary Rules of Civil Procedure actions. The Civil Intake unit also processes all pleadings and motion material filed by mail and fax. The Civil Intake Unit also provides service to the CM & SR procedures telephone lines. The Client Service Representatives staffing the intake counter also commission affidavits, and sign orders within the powers of the Registrar.

Civil Scheduling Unit – Motions Office

Since September 3, 2002, all civil motions and applications in Toronto must be booked via the Civil Scheduling Unit. The unit maintains all of the judicial motion and application calendars, including special appointments, and schedules all the dates by phone, fax, in person or by e-mail. The unit also prints the final lists for use by the judiciary and prepares all material for those court hearings based only on the confirmations received for the booking party. The Unit also generates and mails the notice of case expiry for all Case Management and Simplified Rule actions. In accordance with the respective Rule, the Registrar will determine if the action needs to be dismissed as abandoned and if necessary, generate and sign the order dismissing the action.

Mandatory Mediation

The Mandatory Mediation unit handles all civil case-managed actions, which are subject to mandatory mediation under Rule 24.1 in the Toronto area. Cases are referred to mediation early in the process, giving parties an opportunity to discuss the issues in dispute. The parties, with the assistance of a trained mediator, explore settlement options and may be able to avoid the trial process. Parties may choose to select from a roster of approximately 300 mediators in the Toronto area or may select from the private sector. Either way, this unit monitors the progress of each case from inception to the end of the mandatory mediation process.

Masters Administration

The core function of Masters Administration, is to provide direct support to the Masters of the Superior Court. The Case Management Registrar/ Administrative Assistants organize all administrative functions emanating from the Master's office, acting as a liaison between the Master, the legal profession, internal offices, stakeholders and the general public. The orders generated by CM Masters directly affect multiple departments including Motions/ Scheduling unit, Civil trial office, Trial scheduling court, Mandatory mediation, Call-over and Transitional court and SR pre-trials, so the registrars work to effectively communicate and coordinate between offices. Some of

the core responsibilities of the registrars are to coordinate and maintain the masters schedule, organize case conferences, data enter all orders, monitor timetables, provide procedural information and act as a registrar in CM motions court.

Data Entry Unit

The primary function of this unit is to enter the case details into an electronic database called SUSTAIN together with all new claims information and all event dispositions. Other functions of the unit include transferring files into and out of Toronto, answering procedural questions on the general information telephone line, ordering and sending files for assessments and issuing and entering orders and judgments.

Transition Unit

There are a number of civil cases in the Toronto courts records, commenced prior to 100% Case Management, that have no final dispositions. The Transition Unit is responsible for calling these cases into court (aka Call-Over Court) and seeing that they are dealt with in a timely and effective manner. After going through the Call-Over Court process, most cases are dismissed, transferred to case management, or set down for trial.

Civil Court Staffing

This unit is responsible for the hiring and training of court support staff, i.e. Court Registrars and Court Services Officers (aka CSO's) who provide the necessary assistance to the judiciary to ensure the smooth functioning of all courtroom proceedings. This unit is also responsible for the scheduling/assignment of trained Registrars and CIO's into various courts on a daily basis throughout the Toronto Superior Court in both jury and non-jury cases in the following areas; civil, family, masters, bankruptcy, estates, assessment, Divisional Court, etc.

Records Office

The Records Office is responsible for maintaining the files for Civil Litigation, Family Law, Estates, Bankruptcy and Commercial. The Records Office is responsible for ensuring the safekeeping of sealed files and/or documents, maintaining trial exhibits, retrieval of court files stored off-site and ensuring compliance with Records Retention Schedule.

Civil Trial Office

The Civil Trial Office is responsible for scheduling of trial and settlement conferences under the direction of the Regional Senior Justice. For settlement conferences under Rule 77 timelines are ensconced in the Courts of Justice Act and Rules of Civil Procedure, and staff work closely with the Masters to see that these timelines are met. In the Toronto Region, teams of judges are assigned to hear these cases.

Masters' Demographic Report

MASTER	*Status*	*Appointed*			*Turns Age 65*		*Mandatory Retirement **	
		Month	*Day*	*Year*	*Month*	*Year*	*Month*	*Year*
S.D. Cork	Retired - end of 2002	May	29	1978	already	1993	Mar.	2003
G. C. Saunders	Master - part time	June	6	1962	already	1996	Mar.	2006
H. F. Sedgwick	Master - part time	Feb.	26	1979	already		Mar.	2005
B.T. Clark	Master - part time	Oct.	1	1984	already	1999	Nov.	2007
D. H. Sandler	Master - full time	Mar.	23	1977	Jan.	2005	Jan.	2015
R. B. Peterson	Master - full time	Apr.	18	1979	April	2012	April	2022
R. B. Linton	Master - full time	April	21	1983	already	1998	Aug.	2008
J. Polika	CM Master	Apr.	7	1997	May	2006	May	2016
C. Albert	CM Master	Nov.	30	1998	April	2018	April	2028
C. MacLeod	CM Master	Nov.	30	1998	Mar	2021	Mar.	2031
J. Haberman	CM Master	Nov.	30	1998	Nov	2019	Nov.	2029
S. Birnbaum	CM Master	Jan.	18	1999	Sep	2008	Sep	2018
L. Abrams	CM Master	Feb.	1	1999	Jan.	2028	Jan.	2038
J. M. Kelly	CM Master	Mar.	12	2001	Oct	2004	Oct.	2014
R. Dash	CM Master	Mar.	12	2001	April	2012	April	2022
R. Brott	CM Master	Mar.	12	2001	Feb	2022	Feb	2032
T. Hawkins	CM Master	Mar.	12	2001	April	2007	April	2017
J. Egan	CM Master	Mar.	12	2001	Mar	2016	Mar.	2026

* subject to approval of annual renewals after age 65

As at December, 2003

APPENDIX 8
Masters' Standardized Forms

SUPERIOR COURT OF JUSTICE - TORONTO REGION
MASTER _____

CASE CONFERENCE REQUEST FORM (Use more space or additional pages as required)
(Identify this and all related actions by court file number and short title)

File number and title: _____
File number and title: _____
File number and title: _____

CASE CONFERENCE REQUESTED BY (name of counsel and party): _____
_____

Is this request made on behalf of all parties? [ ] yes [ ] no
Proposed method: [ ] by telephone (dial directly to Master's chambers: 416-_____)
[ ] by attendance
[ ] in writing (consent matters where explanation provided)

NATURE & STATUS OF CASE_(S): _____
_____
_____
_____

PURPOSE OF CASE CONFERENCE:

[ ] Identify issues
[ ] Explore methods to resolve contested issues
[ ] Obtain an order on consent of all parties
[ ] Other procedural matter: _____
[ ] Create a timetable
[ ] Vary an existing timetable

_____
_____

The parties consent to the following order[1] (for case conference in writing):

_____
_____
_____

If you seek to extend the deadline for mandatory mediation on consent you must explain how the request meets the criteria in rule 24.1.09(2): _____
_____
_____

DISPOSITION (to be completed by Master). **THIS COURT ORDERS:**
[ ] order to go as asked OR [ ] Other: _____
_____
_____
_____
_____

[ ] The parties shall attend a case conference [ ] by attendance, or [ ] by telephone to be arranged by _____ on _____ (date to be assigned by the court).
No formal order is required.

Date: _____ _____
Master

_____

[1] subject to court approval based on adequate grounds being shown.

PROPOSED TIMETABLE (Use more space or additional pages if required)
(Identify all related actions to be covered by the timetable)

Short Title & Court File No.: _____

Short Title & Court File No.: _____

Counsel and parties:

Counsel for _____: _____
(counsel's name, phone, fax)

Counsel for _____: _____
(counsel's name, phone, fax)

Counsel for _____: _____
(counsel's name, phone, fax)

CASE TIMETABLE

[ ] agreed to by all parties and complies with rules 77 & 24.1

[ ] agreed to by all parties but requires approval (does not comply with rules 77 & 24.1)

[ ] not agreed to by all parties: timetable proposed by _____

Date Action Commenced: _____

Date First Defence filed: _____ + 240 days = _____

Enter dates by which the various steps are to be completed. Ensure that sufficient time is allowed to accomplish the step. If counsel cannot agree on an element enter "*To be Resolved*" and then each party should prepare and attach a separate schedule setting out their position on the items that cannot be agreed upon for submission to the Court. The Court may by order extend any time period.

1. Select mediator by (30 days from 1st Defence unless extended)**Date:**_____
2. Exchange affidavits of documents by **Date:** _____
3. Complete mediation by (within 90 days of first defence) **Date:** _____
   [rule permits one 60 day extension on consent for standard track actions)
4. Complete discoveries by **Date:** _____
5. Comply with undertakings by **Date:** _____
6. Complete hearing of discovery motions by **Date:** _____
7. Trial scheduling court **Date:** _____
8. Other: (eg. expert reports) _____by **Date:** _____
9. Complete settlement conference by **Date:** _____
   [maximum 240 days from first defence unless extended by court - date assigned at trial scheduling court for standard track cases]

Date timetable submitted: _____
Submitted by: _____

DISPOSITION (to be completed by Master). **THIS COURT ORDERS**:
[ ] timetable approved OR [ ] Other: _____
_____
_____

Date: _____ **Master** _____ _____
Case Management Master's signature

APPENDIX 9

Case Management Implementation Review Committee
Court House
361 University Avenue
Toronto Ontario
M5G 1T3

Memorandum

To: Regional Senior Justice Blair

From: Justice Lang, Chair

Date: June 23, 2003

Re: Case Management

We await the Advocates' Society input before we are able to provide you with a final report. As you are aware, we anticipate being in a position to report in October.

In the meantime, case management is at a critical turning point. 100% case management has been in effect in Toronto for two years. It is our preliminary sense that the majority of lawyers are in support of the concept. There are growing concerns, however, with respect to the availability of early trial dates, particularly for trials over five days, and even more so for trials over ten days. Acceptance of case management will be negatively and seriously impacted if the Toronto Region is unable to give trial dates within a reasonable time after a matter is ready for trial. Trial Scheduling Courts will be counter-productive if they have the effect of telling the bar that the Toronto Region is unable to give timely trial dates. We also are advised that there are problems with long motions dates.

We recommend, pending our report, that Toronto Region institute procedures to emphasize timely civil trials. Such procedures may include Justice Campbell's proposed long trials pilot project. Consideration may also be given to a civil trials/motions blitz, to a different trial scheduling protocol, to considering the issue of "assignment" type courts, to requiring counsel to file "trial plans" before trial, or to implementation of other initiatives to maintain case management's objective of expeditious resolution of civil disputes.

It was the view of the committee that we should advise you of this concern on an interim basis. We understand that the cause of the current scheduling problems may be attributed to the increasing influx of motor vehicle cases into the civil litigation system.

If the meantime, while our report is delayed, the Masters have undertaken initiatives to maintain a consistent approach on extensions and variations of timetables as well as implemented initiatives to provide critical case management information to the bar.

SUPERIOR COURT
OF JUSTICE
Toronto Region

Ontario

CASE MANAGEMENT
Information Package

Court File Number

Short Title: _____

This action is subject to **CASE MANAGEMENT** under **RULE 77** and **MANDATORY MEDIATION** under **RULE 24.1** of the ***RULES OF CIVIL PROCEDURE.***

It is the responsibility of the plaintiff to advise the court if it appears this action is exempt from case management under Rule 77.01 (2) or mandatory mediation under Rule 24.1.04 (2.1) If this action is a third party claim, or is related to an action already under case management, it is the responsibility of the person issuing the claim to advise the court so that it may be assigned to the same team and master.

The **PLAINTIFF** (or other person issuing the claim) is directed to **SERVE** a copy of this Information Package on **EACH DEFENDANT** together with the Statement of Claim or originating process.

It is the responsibility of the litigants and their counsel to be familiar with the Rules governing this action. **THE COURT IS NOT RESPONSIBLE** for sending notices or advising parties that times will expire or have expired.

FAILURE to adhere to case management times or timetables can result in **SANCTIONS**, **LOSS OF RIGHTS** and **OTHER CONSEQUENCES**. *(See in particular Rule 77.10)*

The **TRACK** selected for this proceeding is *(check one)*:
(track selected by the plaintiff under Rule 77.05(1))

- ☐ Fast Track
- ☐ Standard Track

The **CASE MANAGEMENT MASTER** assigned to this file is *(to be completed by court staff)*:

The fax number for the Case Management Masters office is 416-326-5416.

- ☐ Master Abrams
  Registrar: 416-326-1127
- ☐ Master Albert
  Registrar: 416-326-3272
- ☐ Master Birnbaum
  Registrar: 416-326-1083
- ☐ Master Brott
  Registrar: 416-327-9282
- ☐ Master Dash
  Registrar: 416-327-9355
- ☐ Master Egan
  Registrar: 416-327-8730
- ☐ Master Haberman
  Registrar: 416-326-3241
- ☐ Master Hawkins
  Registrar: 416-327-8798
- ☐ Master Kelly
  Registrar: 416-327-9549
- ☐ Master MacLeod
  Registrar: 416-326-3292
- ☐ Master Polika
  Registrar: 416-326-3265

For case management purposes, this action has been assigned to a team of judges and a particular case management master. The court may change these assignments if required. Assignment of a particular case management judge may be available on motion under Rule 77.09.1. All motions or case conferences within the jurisdiction of a case management master will normally be to the assigned master who will remain seized of the matter until trial or other final disposition. Please obtain the Toronto Region scheduling protocols in regard to case conferences or motions.

IMPORTANT NOTE
Case Managed Actions

Under case management, all actions are subject to the default times set out in the *Rules of Civil Procedure* and in particular the times in Rule 24.1 and Rule 77. Extensions of times prescribed by the rules require a court order. Such an order may be obtained on motion or by a case conference. If all parties are in agreement on the timetable and the need for extensions of time, it may be possible to obtain approval by a case conference in writing. Case conference or timetable forms that may be used for this purpose are available from the court. Motions must be in Form 77C.

Particular **attention must be paid to the following times** which will apply unless extended by order:

1. The action will be **dismissed as abandoned 180 days after the claim has been issued** unless a defence has been filed or judgment obtained *(Rule 77.08)*. **Apart from the time in Rule 77.08, most case management times run from the filing of the first defence (that is the date on which any defendant files a defence or notice of intent to defend). In cases with multiple defendants, the plaintiff should be alert to the potential need for early variation of the default times.**
2. The parties must select a mediator and notify the mediation co-ordinator of the name of the mediator and the date for the mediation by **filing Form 24.1A within 30 days** of the first defence failing which a roster mediator will be appointed in rotation. *(Rule 24.1.09 (5) & (6))*
3. The **mandatory mediation session must be completed within 90 days** from the date the first defence was filed *(Rule 24.1.09 (1))*. In standard track actions only, one extension of up to 60 days is available without an order by filing a consent with the mediation co-ordinator. *(Rule 24.1.09 (3))*
4. All **production, discoveries and motions arising from production or discovery shall be completed before the date of the settlement conference** (150 days from the filing of any defence in fast track cases and 240 days from the filing of any defence in standard track cases)
5. In Toronto, in fast track cases, a **settlement conference will be scheduled within 150 days** of the filing of any defence or notice of intent to defend.
6. In Toronto, in standard track cases, the action will be deemed to be on the trial list 240 days after the first defence or notice of intent to defend is filed and a settlement conference will be ordered or the action will be **listed for trial scheduling court**. Parties attending trial scheduling court are expected to be **ready to set trial dates** and to schedule a meaningful settlement conference.
7. Settlement conference briefs under Rule 77.14 must include **lists of proposed witnesses with summaries of their evidence and extracts from experts reports**. Settlement conferences (as opposed to mediation) are designed to take place when the case is ready for trial.

THESE ARE THE DEFAULT TIMES THAT APPLY UNLESS THE COURT ORDERS OTHERWISE. The court will grant extensions of time where necessary to allow for the proper conduct of the proceeding. The procedure for obtaining an extension is set out below.

Rule 77.02 reads as follows:

The purpose of this Rule is to establish a case management system throughout Ontario that reduces unnecessary cost and delay in civil litigation, facilitates early and fair settlements and brings proceedings expeditiously to a just determination while allowing sufficient time for the conduct of the proceeding.

If all parties agree on a timetable for the proceeding, the timing of events and the extension of times, the simplest way to request an order is to send a written timetable with an explanation to the case management master. If the parties cannot agree, a timetable may be created at a case conference booked through the responsible master's registrar or by motion.

Requests for extension of time under the mandatory mediation rule should address the specific criteria set out in Rule 24.1.09 (2). *The purpose of mandatory mediation is to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes.* The court may exempt a case from mandatory mediation if an appropriate Alternative Dispute Resolution (ADR) option is agreed upon *(see Rules 24.1.05 and Rule 77.14 (6) (c))* or in other circumstances if mediation is not appropriate. Parties who wish to devise their own ADR process should agree on an ADR plan and seek the necessary approvals before the times in Rule 24.1 are engaged.

The parties should collaborate on timing and procedure at an early stage and call upon the court for assistance if necessary. Parties who can work within the default times or who file a complete agreed upon timetable and obtain the necessary extensions in a timely manner can minimize costs, attendances and default notices.

IMPORTANT NOTE
Regarding Motions

All motions in case managed proceedings require a notice of motion in Form 77C. A motion record and supporting affidavit may or may not be required depending on the nature of the motion and whether or not there are facts in dispute that will have to be adjudicated.

All motions, except for motions in writing, and special appointment motions before a case management master, must be booked through the scheduling unit

The Scheduling Unit may be reached by phone: **416 327 5292**, fax: **416 327 9470** or e-mail:
jus.g.mag.csd.civilmotionsscheduling@jus.gov.on.ca

The Registrar may sign many **consent** motions. *(See Rule 77.12 (5))*. Most contested motions are within the jurisdiction of the **case management master**. Certain motions must be brought before a **case management judge**. *(Rules 37 and 77.04 (1))*

All motions in Toronto case managed actions must be brought **in Toronto** regardless of where the parties or their counsel are located. It is the responsibility of the moving party to ensure the scheduling unit is aware the action is a case managed action when booking a motion and, for masters' motions, which master is assigned to the case.

Please see the motion scheduling Advisory Notice for Toronto Region.

Rule 77.12 (2.1) contains provision for motions in writing, by fax, by telephone or by videoconference. Appropriate arrangements must be made in advance through the scheduling unit or with the presiding judge or master.

LITIGANTS SHOULD OBTAIN THE FOLLOWING DOCUMENTS:
(Copies are available from the court)

Bulletins & Directions

1. Bulletin for Parties to Mandatory Mediation
2. Advisory Notice for Toronto Region motion scheduling practice
3. Notice Regarding Trial Scheduling Court

Forms

4. Form 77C Notice of Motion
5. Case Conference Form
6. Timetable Form

IT REMAINS THE RESPONSIBILITY OF THE PARTIES *to be familiar with the* Rules of Civil Procedure, *practice directions, and other directives governing the conduct of litigation in the Toronto Region as well as orders or directions affecting this specific action.*

This information package is provided for the convenience of litigants and counsel and contains a summary of some of the key Case Management Requirements.